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CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 919

RICHARD E. LANG, EXECUTOR, AND GRACE E. LANG, EXECUTRIX, OF THE ESTATE OF JULIUS C. LANG, DECEASED,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED APRIL 2, 1938.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 5, 1938.

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[fol. 1]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 8459

Estate of Julius C. Lang, Deceased, and Richard E. Lang, Executor and Grace E. Lang, Executrix, of the Estate of Julius C. Lang, Deceased, Petitioners,

vs.

Commissioner of Internal Revenue, Respondent

Certificate to the Supreme Court of the United States of Questions of Law Upon Which the Circuit Court of Appeals for the Ninth Circuit Desires Instruction for the Proper Decision of a Cause—Filed March 18, 1938

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

Statement of Case

There is pending before this court a petition by the executors of Julius C. Lang, deceased, and his estate to review a decision of the United States Board of Tax Appeals sustaining a determination by the Commissioner of Internal Revenue of a deficiency in estate taxes owing by the petitioners.

The decedent, Julius C. Lang, died in 1929, a citizen and resident of the State of Washington. At the time of his death there were in force and effect seventeen policies of insurance on his life. They totalled over $200,000.00. Of fourteen — these policies, his wife was beneficiary. The other three named his children as beneficiaries. All the policies required the payment of premiums in advance and acknowledge the receipt of the first premium.

From 1905 until the date of his death, the decedent was married and he and his wife, now surviving him, were both [fol. 2] citizens of Washington, where the community property law obtains. Of the seventeen life insurance policies in effect at the time of his death, fourteen (including the three of which decedent's children were beneficiaries) were applied for by him during his marriage and all the first

premiums precedent to the issuance of the policies and all subsequent premiums were paid from community funds of himself and his wife. The remaining three were issued to him before his marriage. The first few premiums on these three were paid by him out of his separate property and the remainder paid out of community funds.

The Commissioner of Internal Revenue determined a deficiency against the decedent's estate based upon his ruling that the entire proceeds of these insurances should be included in determining the amount taxable in the gross estate, thereby creating an excess over $40,000.00 in the total. This ruling was made under the provisions of § 302(g) of the Revenue Act of 1926:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance taken out by the decedent upon his own life."

The petitioners contend that in determining the value of the gross estate, but one-half of the amounts receivable on the policies should be attributed to the estate of the deceased husband, where the policies were applied for and issued and the premiums on the policies were paid after the marriage and out of the funds of the community belonging to both the husband and wife. As to the policies issued before the marriage, but upon which premiums paid after marriage were paid from the community funds of both husband and wife, a proportionate amount of the insurance determined by the ratio of the premiums paid otherwise than from community funds to the total of premiums paid, plus one-half the remainder, should be attributed to the estate of the deceased husband.

[fol. 3] The record presents the contention that but one-half of the insurance collectible is attributable to the estate of the husband in two forms:

First. Applicable to all the insurance policies, that since the policy premiums are paid for by funds in which the

wife has her one-half community interest, the policies must be deemed to be "taken out by" the community (and hence one-half by the wife), (a) as to the entire fourteen policies on which all the premiums are paid out of community funds and (b) as to a proportionate portion of the three policies issued before marriage, upon which the community funds paid the premiums thereafter.

Second. Applicable to the policies issued after marriage, that since the first prepayment premiums of the policies are required for their issue, they must be deemed to have been applied for by the husband as agent of the community and, when issued to the husband, must be deemed to be "taken out *by*" the community (and hence one-half by the wife) through the husband as the community's agent, the community payments of all subsequent premiums both evidencing the original community character of the application and issue and the continuity of the community ownership.

We have recently had occasion to consider the community property law of the State of Washington in the case of Graham v. Commissioner, No. 8497, March 4, 1938. We there held that in that State the community between spouses is a separate entity for which each spouse, in earning money, acts as its agent.

In Washington, as in other community property states, life insurance purchased with community funds is community property, and the husband cannot defeat its community character by the exercise of a power, given him by the policy, to nominate or change the beneficiary. In re Brown's Estate, 124 Wash, 273, 277; Shields v. Barton, (C. C. A.-7) 60 Fed. (2d) 351, 352; Union Mutual Life Ins. Co. v. Brockerick, 196 Cal. 497, 507.

So completely does the Washington law merge the spouses into the community, that it is with more than jest that the creditor of one of them prior to marriage, ironically speaks of it as a discharge in bankruptcy of the spouse-debtor as to his earnings thereafter. Huyvaerts v. Roedtz, 105 Wash. 657.

[fol. 4] The Commissioner has on this appeal relied on the case of Bank of America v. Commissioner, (C. C. A.-9) 90 Fed. (2d) 981, 983. A somewhat similar question was there presented to this court, arising under the community

property law of the State of California, similar in effect to that of Washington.

In that case the decedent was the insured under policies for which, while married, he had applied and which were issued to him. All the premiums were paid out of the community property of the insured and his wife. The identity of the beneficiaries does not appear. This court, in an opinion by Judge Haney, concurred in by Judge Garrecht, with Judge Wilbur dissenting, held that the entire proceeds of the insurance over $40,000 was properly included in the gross estate subject to tax. In that case it was stipulated that the policies were "taken out by the decedent upon his own life". It was held that the stipulation brought the entire insurance within the terms of the Revenue Act. In that respect the case is distinguishable from the one at bar, there being no such stipulation here.

However, the court in the Bank of America opinion expressed the view that in any case the local law determining such an incident of community property as the agency or principal character of the husband, cannot affect the interpretation of the Revenue Act.

With this view we are not satisfied. The community is an entity, just as a corporation or an association. The Congress could have imposed a tax upon its estate on its termination by death of one of the spouses, but has chosen not so to do. It is, therefore, pertinent to determine whether the husband as its agent or on his own behalf took out the insurance.

It is true that a local rule or statute does not override the provisions of federal tax statutes, but the state law may determine facts of agency or property upon which the federal statute must operate.

In the case of Poe v. Sanborn, 282 U. S. 101, the Supreme Court held that the Washington community property law controlled the application of the phrase "income of individuals" in the statute creating the income tax, and that it was one-half the "income of" each of the spouses. We are unable to distinguish the application of the reasoning in that case on the meaning of the preposition "of" from [fol. 5] its application to the similarly pregnant preposition "by" in the phrase "taken out by" the insured. It supports the reasoning that the Washington law as to the agency character of the husband, determines whether the insurance is taken out "by" him individually or "by" the

community—that is, one-half "by" him and one-half "by" his wife. Not being satisfied with this previous decision by two of the seven Circuit Judges eligible to sit in a court in which two constitute a quorum, and three usually sit, we deem the questions here, in view of their importance, are proper ones to certify.

Desiring instruction for the proper decision of the above cause, of which the nature and facts are as above stated, the Circuit Court of Appeals for the Ninth Circuit submits the following questions:

Questions Certified

1. A husband and wife were at all pertinent times residents of the State of Washington, and the husband, during marriage, applied for a policy of insurance on his own life, (which policy was to be payable to beneficiaries other than his estate or his representatives), and, from funds of the community, paid the first premium thereon, required to be paid prior to or concurrent with the issue of the policy, and thereafter received the policy, and all subsequent premiums on such insurance were paid for solely with community funds of the husband and his wife, and the husband, while both spouses resided in the State of Washington, thereafter died. In such a situation, in determining the amount of insurance, if any, in excess of $40,000, to be included in the gross estate of the deceased husband to be subject to the estate tax under the estate tax provisions of the Revenue Act of 1926, and particularly §302(g) thereof, is the entire amount of the insurance in the last sentence described, or only one-half thereof, deemed to be "taken out by" the husband and to be included in the amount in his estate?

2. A resident ~~of~~ the State of Washington, being unmarried, applies for and receives a policy of insurance upon his own life, which policy is payable to beneficiaries other than his estate or his representatives, and pays premiums thereon out of his separate property, and subsequently is married, and, while being married and a resident of the State of Washington, pays further premiums on such policy out of community funds of himself and his wife, and while [fol. 6] both are residents of the State of Washington the

husband dies. In this situation, in determining the amount of insurance, if any, in excess of $40,000 in the gross estate of the deceased husband, sought to be taxed under the estate tax provisions of the Revenue Act of 1926, and particularly § 302(g) thereof, should it be computed by inclusion of that portion of the insurance which is paid for by premiums paid from community funds of the husband and wife?

3. If the answer to the last question be in the negative, should the amount of insurance to be included be that proportion thereof which the premiums paid by the husband out of the funds other than those of the community bear to the total premiums paid plus one-half the remaining insurance?

Dated at San Francisco, California, March 18, 1938.
William Denman, United States Circuit Judge.
Clifton Mathews, United States Circuit Judge.
William Healy, United States Circuit Judge.

A True Copy. Attest March 18, 1938. Paul P. O'Brien, Clerk.

[File endorsement omitted.]

[fol. 7] In United States Circuit Court of Appeals for the Ninth Circuit

No. 8459

[Title omitted]

Amendment to Certificate of the United States Circuit Court of Appeals for the Ninth Circuit, March 18, 1938, Certifying Questions of Law to the Supreme Court of the United States—Filed March 24, 1938

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

Desiring fuller instructions upon the law applicable to the facts stated in the Certificate heretofore filed in the above entitled case, we hereby amend said certificate by adding thereto the following considerations and questions.

Concerning those policies of which the wife is beneficiary we have the added consideration that, under the Washington

law concerning her half ownership of the community funds, the beneficiary has paid one-half the premiums producing the benefit.

[fol. 8] ADDITIONAL QUESTIONS

4. Incorporating herein by reference the facts stated in question 1, there is added the further fact that the decedent's surviving spouse is the sole beneficiary of the said insurance policy. If the answer to question 1 be that the entire amount of the insurance there described is to be deemed "taken out by" the husband and deemed to be included in the amount of his estate, does the inclusion of the additional fact herein stated require that only one-half of said insurance is so to be deemed?

5. Incorporating herein by reference the facts stated in question 2, there is added the further fact that the decedent's surviving spouse is the sole beneficiary of said policy. If the answer to question 2 be in the affirmative, does the inclusion of the additional fact herein stated require that one-half of that portion of the insurance which was paid for out of community funds of the decedent and his wife be excluded from the gross estate of the decedent?

Dated at San Francisco, California, March 24, 1938.
William Denman, United States Circuit Judge.
Clifton Mathews, United States Circuit Judge.
William Healy, United States Circuit Judge.

A True Copy. Attest March 24, 1938. Paul P. O'Brien, Clerk.

[File endorsement omitted.]

Endorsed on cover: File No. 42,400. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 919. Richard E. Lang, Executor, and Grace E. Lang, Executrix, of the Estate of Julius C. Lang, Deceased, vs. Commissioner of Internal Revenue. Certificate. Filed April 2, 1938. Term No. 919, O. T., 1937.

FILE COPY

No. 919

IN THE

Supreme Court of the United States

October Term, 1937

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Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' OPENING BRIEF

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No. 919

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' OPENING BRIEF

JURISDICTION

This proceeding arose through an appeal by the petitioners to the Board of Tax Appeals from a proposed additional assessment of estate taxes (R. 1). The decision of the Board is reported in Volume 34 B. T. A. 337, which is the only opinion herein. The petitioners sought a review of the Board's decision in the Circuit Court of Appeals for the Ninth Circuit, under Section 1001 of the Revenue Act of 1926, as amended by Section 1006A of the Revenue Act of 1932, and Section 1002 of the Revenue Act of 1926, as amended by Section 519A of the Revenue Act of 1934. Following argument to the Circuit Court of Appeals, that court has certified certain questions and propositions of law, under Section 239 of the

Judicial Code, as amended by the Act of February 13, 1925 (R. 5, 7).

STATEMENT OF FACTS

The decedent died December 23, 1929. His estate was subject to the Federal Estate Tax of 1926. There were in force at the time of his death seventeen insurance policies upon his life, aggregating a total in excess of $200,000.00. He had married in 1905, and thereafter, until his death, he and his wife, who survived, were citizens of the State of Washington, a community property state. Fourteen of the policies were applied for after marriage, and the first and all subsequent premiums thereon were paid from community funds. The decedent's wife was the sole beneficiary under eleven of these fourteen policies, and his children were the beneficiaries in the other three. The remaining three policies were issued to decedent before marriage, and the first few premiums thereon were paid by him out of his separate property and the remainder were paid out of community funds, and his wife was beneficiary thereof (R. 1, 2).

The questions presented herein depend on a construction of Section 302(g) of the Estate Tax Act of 1926, as applied to the proceeds of such policies. This section, except for a slight addition made in the Revenue Act of 1934, has been contained in identical terms in the Revenue Acts of 1918 and 1921 (Section 402), and the Revenue Acts of 1924, 1926, 1932 and 1934 (Section 302(g)). It reads as follows, the addition of 1934 being included in brackets:

"Sec. 302 (as amended by Section 404 of the

Revenue Act of 1934). The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated [except real property situated outside the United States] * * *.

"(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life * * *."

The pertinent provisions of the statutes of the State of Washington relating to community property, and the Commissioner's regulations issued under the Federal Estate Tax Acts, are set out in appendices to this brief following page 27.

STATEMENT OF QUESTIONS PRESENTED

An original and amended certificate have been submitted herein, which, taken together, seem to present the following problems for solution, based upon the facts set forth in the above statement:

1. In the case of a policy issued after marriage upon the life of a decedent husband, on which all of the premiums were paid with community funds and under which the wife is the sole beneficiary, are all or only one-half of the proceeds, less $40,000.00, to be included in the gross estate? (Questions 1 and 4)

2. In the case of a policy issued, prior to marriage, upon the life of a decedent husband, the premi-

ums on which were paid before marriage from decedent's separate funds and after marriage from community funds and under which the wife is the sole beneficiary, are all of the proceeds in excess of $40,000.00 to be included in the gross estate or should they be reduced by one-half of that proportion of the total proceeds which premiums paid with community funds bear to total premiums paid? (Questions 2, 3 and 5)

3. In the case of a policy issued after marriage upon the life of a decedent husband, payable to his children as beneficiaries, on which all of the premiums were paid with community funds, should the full amount or only one-half of the proceeds, less $40,000.00, be included in the gross estate? (Question 1, unqualified by Question 4)

PETITIONERS' CONTENTIONS

The petitioners' contentions are as follows:

1. In the case of the policy issued after marriage and payable to the wife, only one-half of the proceeds, less deduction of $40,000.00, should be included in the decedent's gross estate.

2. In the case of the policy issued before marriage in which the wife is the beneficiary, only an amount of the proceeds proportionate to the amount of premiums paid with separate funds to total premiums paid, plus one-half of the remainder, and less deduction of $40,000.00, should be included in the gross estate.

3. In the case of the policy payable to the children, issued after marriage and paid for entirely with community funds, only one-half of the proceeds, less

deduction of $40,000.00, should be included in the gross estate.

SUMMARY OF ARGUMENT

A. The wife's interest in community property under the law of the State of Washington is equal to that of her husband. She owns one-half of any insurance maintained with community funds which cannot be diverted by the husband without her consent.

B. Only the husband's half interest in community property is subject to inclusion in the gross estate.

C. The gross estate under the Federal Estate Tax Act cannot include the wife's property and rights which are not affected by the husband's death.

D. Under the applicable regulations only the insurance paid for by the husband's funds is deemed to have been taken out by him.

E. Irrespective of the regulations, insurance payable to the wife under policies which have been maintained with community funds should, to the extent of one-half thereof, be excluded from the gross estate of the husband.

F. The same principles apply to a policy which has been maintained with community funds under which decedent's children are beneficiaries.

ARGUMENT

In approaching the problems presented, we are handicapped by the fact that in the court below the Commissioner relied solely on the decision of the Ninth Circuit in *Bank of America v. Commissioner*,

90 F. (2d) 981 (R. 3), and did not undertake any discussion of the general principles involved, so that we do not know his position upon them. For this reason it may be that our argument will cover various propositions which will not be disputed.

General Principles

As a foundation for the petitioners' contentions as to the proper answers to be made to the questions submitted, they advance the following propositions:

1. Under the laws of the State of Washington, the marital community is a separate legal entity and a special legal concept, *sui generis*.

> "It was plainly the intention of the legislature, in the session of 1879, in the passage of the chapter denominated 'Property rights of married persons', Code Wash. T., chap. 183, to depart from the common law and breathe into legal existence a distinct and original creation, partaking, somewhat, of the nature of a partnership and of a corporation, but differing in some essentials from both; and this creature is termed a 'community.' "

Brotton v. Langert, 1 Wash. 73, at 78, 23 Pac. 688.

See also:

Holyoke v. Jackson, 3 Wash. Ter. 235, 3 Pac. 841;

Warburton v. White, 176 U. S. 484, 20 S. Ct. 404, 44 L. ed. 555;

Graham v. Commissioner, 384 C. C. H. § 9172 (9th Circuit, March 4, 1938).

2. The interests of husband and wife in community property are identical so far as ownership is concerned. The wife's right therein is an absolute and vested one, equal in all respects to that of her husband.

> "In this state * * * as has always been stated by this court, the wife has a vested property right in the community property equal with that of her husband, and in the income of the community, including salary or wages of either husband or wife, or both."
>
> *Occidental Life Insurance Co. v. Powers*, 92 Wash. Dec. 425, at 433, 74 P. (2d) 27.
>
> "The books are full of expressions such as 'the personal property is just as much hers as his' (*Marston v. Rue*, 92 Wash. 129, 159 Pac. 111, 112); 'her property right in it (an automobile) is as great as his' (*Id.*, 92 Wash. 133, 159 Pac. 111, 113); 'the title of one spouse therein was a legal title, as well as that of the other' (*Mabie v. Whittaker*, 10 Wash. 663, 29 Pac. 172, 175).
>
> "Without further extending this opinion it must suffice to say that it is clear the wife has, in Washington, a vested property right in the community property, equal with that of her husband; and in the income of the community, including salaries or wages of either husband or wife, or both.
>
> "* * * We are of opinion that under the law of Washington the entire property and income of the community can no more be said to be

that of the husband, than it could rightly be termed that of the wife."

Poe v. Seaborn, 282 U. S. 101, 9 A. F. T. R. 51 S. Ct. 58, 75 L. ed. 239.

See also opinion of the Attorney General of the United States in community property cases:

T. D. 3138, 4 C. B. 238;

Schramm v. Steele, 97 Wash. 309, 166 Pac. 634.

3. While the husband has the right of management of the community property under Remington's Revised Statutes § 6892, this is merely a statutory agency created for convenience which does not in any wise elevate his actual proprietary interest in the community estate above that of his wife.

Warburton v. White, 176 U. S. 484, 20 S. Ct. 404, 44 L. ed. 555;

Poe v. Seaborn, 282 U. S. 101, 51 S. Ct. 58, 75 L. ed. 239.

4. A husband has no right either of property or ageny entitling him to alienate the interest of the wife in community property.

Poe v. Seaborn, 282 U. S. 101, 51 S. Ct. 58, 75 L. ed. 239;

In re McCoy's Estate, 189 Wash. 103, 63 P. (2d) 522;

Schramm v. Steele, 97 Wash. 309, 166 Pac. 634, and cases therein cited.

In the last case, the Supreme Court of Washington said:

"The husband is made, by the statute, the manager, not the owner. His management and

control include the power of absolute disposition, but only for the community.

"* * * These considerations make it plain that the statute, in conferring upon the husband the management and control of the community property, though giving him the absolute power of disposition of community personalty, intends no more than to make him the statutory agent of the community."

5. The foregoing principles were recently applied in the case of *Occidental Life Insurance Company v. Powers*, 92 Wash. Dec. 425, 74 P. (2d) 27 (an *en banc* decision rendered December 7, 1937) to a determination of rights in a policy of life insurance issued to the husband after marriage and paid for with community funds, in which the wife was named as beneficiary, with right in the insured to change the beneficiary, which he did in favor of his mother and secretary, to the exclusion of his wife. Declaring that the husband could act only as a statutory agent for the benefit of the community, and that here the transaction was without any consideration to the community, the court held that the change of beneficiary was invalid, not only as to the right of the wife to half the proceeds upon the death of the husband, but as to the entire proceeds. The court states as follows:

"* * * In this state, insurance or the proceeds of insurance are not mere expectancies or choses in action, but are property; and if the premiums are paid by the assets of the community, they constitute community property."

To the same effect, see *In re Brown's Estate*, 124

Wash. 273, 214 Pac. 10, holding that insurance on the husband's life, paid with community funds, is community property and the wife owns one-half thereof; and *Shields v. Barton* (7th Circuit) 60 F. (2d) 351, allocating the community interest in proportion to the amount of premiums paid before and after marriage, in the case of a policy taken out prior to marriage. There are many other cases to the same effect from other states, particularly from California, which it seems unnecessary to cite, as the Washington law is well-settled.

6. Under the Federal Estate Tax Act, the gross estate of a deceased husband includes only his half interest in community property and does not extend to his wife's interest therein.

> *Estate of Edward F. Sweeney v. Commissioner*, 15 B. T. A. 1287;
>
> *Coffman-Dobson Bank & Trust Co., Executor, v. Commissioner*, 20 B. T. A. 890;
>
> T. D. 3138, 4 C. B. 238, first opinion of Attorney General in community property cases;
>
> *Estate of Elizabeth Chavez*, 34 N. Mex. 258, 280 Pac. 241, 69 A. L. R. 769, and annotation at 780.

This is recognized in Article 23 of Regulations 70 (1929 Edition) relating to the 1926 Act, as amended by the Act of 1928, in the following language:

> "The entire value of such property is *prima facie* a part of the decedent's gross estate, but as it is not the intent of the statute that there should be so included a greater part or propor-

tion thereof than is represented by an outlay of funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner where neither had parted with any consideration in its acquirement, facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor."

See also Annotations in 383 C. C. H. § 3452.

7. The Federal Estate Tax is an excise tax upon the privilege of transferring or transmitting property by death:

"It follows that unless there is such transfer *from the decedent*—unless there was something which passed from decedent upon death—there has been no transfer; no privilege of transfer has been exercised; and there is nothing which can be subjected to an excise tax on such privilege. Therefore, where life insurance proceeds are involved, the initial inquiry is as to what, if anything, has passed *from the decedent* because of his death."

Walker v. U. S. (Eighth Circuit) 83 F. (2d) 103.

"Where an insured reserved no rights incidental to ownership or control of the policies, so that death transfers nothing to the beneficiary and shifts no economic benefits, there is no transfer within the reach of the taxing power, and such policies are not covered by the statute."

Helvering v. Parker (Eighth Circuit) 84 F. (2d) 838.

In addition to the authorities cited in the foregoing cases, see also *Appeal of Guaranty Trust Company of New York*, 33 B. T. A. 1225.

The Policy Was Not Taken Out by Decedent, as to Wife's Community One-Half

Regulations 70 (1929 Edition) promulgated by the respondent as applicable to Section 302(g) of the 1926 Act, provide in Article 25 that:

> "Insurance is deemed to be taken out by the decedent in all cases where he pays all the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance is not deemed to be taken out by the decedent, even though the application is made by him, where all the premiums are actually paid by the beneficiary. Where a portion of the premiums were paid by the beneficiary and the remaining portion by the decedent the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total of premiums paid."

And Article 28, relating to the valuation of insurance, provides that where the policy is payable to a beneficiary, other than to or for the benefit of decedent's estate, and "* * * only a portion of the premiums were paid by the decedent, the amount to be listed on such schedule is that proportion of the insurance receivable which the premiums paid by the decedent bear to the total premiums paid."

While these provisions were omitted from the 1934 Edition of Regulations 80, in the 1937 Edition of

Regulations 80 there was inserted in Article 25 the following:

> "* * * But in the case of a decedent dying before November 7, 1934 (the date of approval of the 1934 edition of Regulations 80) the provisions of the second paragraph of article 25 of Regulations 70 (1929 edition) will continue to apply."
>
> (The second paragraph of Article 25 referred to includes the portion above quoted from that article.)

The phrase "taken out" has not been defined, except in cases arising under this section of the Estate Tax Act. The interpretation placed thereon by the Commissioner in Regulations 70 was accepted without independent discussion in *Wilson v. Cooks*, D. C. W. D., Missouri, 1931, 52 F. (2d) 692, and *Helvering v. Reybine* (Second Circuit) 83 F. (2d) 215. See also *Appeal of Boston Safe Deposit and Trust Com-Company*, 30 B. T. A. 679 at 687.

Without specific reference to the regulations, the same interpretation was placed upon the statutory language in *Igleheart v. Commissioner* (Fifth Circuit) 77 F. (2d) 704, which affirmed the decision of the Board of Tax Appeals, 28 B. T. A. 888, in which it was said, at page 908:

> "The applicable provisions of the statute should be construed as intending to include all the insurance on a decedent's life in favor of beneficiaries other than his estate which was acquired by him through the expenditure of his own money,

where he has the power to dispose of the proceeds of the insurance at will."

The same situation, arising under the same Act, was the subject of a most thorough and vigorous decision rendered by the Eighth Circuit in *Walker v. U. S.*, 83 F. (2d) 103, where the question presented was identical with that in the present case, except that it involved residents of Minnesota, which is not a community property state, and the premiums paid by the wife were paid from her separate funds. Considering that the wife's proprietary interest in community funds in Washington is equivalent to the wife's ownership of her own funds in Minnesota, we can perceive no distinction between the cases whatsoever, particularly as to the application of Regulations 70. Insofar as the test of beneficial interest or control is concerned, which will be considered later, the present case is much stronger for the petitioners than the *Walker* case, because in the latter the decedent had the right to change the beneficiary and to procure loans, apparently without restriction and for his own interest, which, under the Washington decisions, he could not do, at least as to the wife's community half, without her consent.

In that case the Commissioner questioned the validity of his Regulations 70, Article 25, contending that "taken out by the decedent" means applied for by him, and that section of the Regulations was superseded by the corresponding article of Regulations 80, issued in 1934.

(Footnote 1.) The 1934 edition of Regulations 80 does not contain the provision inserted in Article 25 of the 1937 edition, to which we have

called attention, stating that Article 25 of Regulations 70, 1929 Edition, will continue to apply in the case of a decedent dying before November 7, 1934.

The court held that upon reason and authority, and considering the legislative history of this provision of the Act, and the Regulations issued thereunder, the interpretation given in Article 25 of Regulations 70 is correct, and the rule there laid down the proper one to be applied, and that only that portion of the proceeds proportionate to the premiums paid by the deceased should be considered as "taken out" by him. No review of this case was sought by the government, and apparently the modification of Article 25 in Regulations 80, 1937 edition, is an acquiescence therein.

Respondent did not contend in his brief in the court below that Regulations 70 were inapplicable or invalid, although such a suggestion was made in argument. If it should be advanced here, the answer to it and the reasons justifying the application of Regulations 70 are fully covered in the *Walker* case.

See also Hughes on Federal Death Tax, §56.

Substantially the same interpretation was placed by the Treasury Department on the statutory phrase "taken out" in Regulations 37 issued under the 1918 Act (Article 32), Article 27 of Regulations 63 issued under the 1921 Act, and Article 25 of Regulations 68 issued under the 1924 Act, providing a uniform course of construction over a period of more than sixteen years during which time the statute was repeatedly re-enacted by Congress without substantial change.

Under such circumstances the administrative interpretation as expressed in the regulations is deemed to have received legislative approval.

> *National Lead Co. v. U. S.*, 252 U. S. 140, 40 S. Ct. 237, 64 L. ed. 496;
>
> *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 52 S. Ct. 510, 75 L. ed. 1183;
>
> *Helvering v. Bliss*, 293 U. S. 144, 55 S. Ct. 17, 79 L. ed. 246.

In the last case, the court said:

> "Moreover, from 1923 to 1932 the Commissioner uniformly ruled that the deduction for charitable contributions was to be taken from net income before computation of the tax and in whole from ordinary net income. The reenactment in later Acts of the sections permitting the deduction indicates Congressional approval of this administrative interpretation."

See also:

> *Walker v. U. S.* (Eighth Circuit) 83 F. (2d) 103;
>
> *Mayes v. Paul Jones & Co.* (Sixth Circuit) 270 Fed. 121, 129, 130.

A law or a regulation interpreting it should not be applied retroactively to the prejudice of those who have acted in reliance on it in arranging their affairs.

> *Lewellyn v. Frick*, 45 S. Ct. 487, 268 U. S. 238, 69 L. ed. 934;
>
> *Bingham v. U. S.*, 56 S. Ct. 180, 296 U. S. 211, 80 L. ed. 160.

In the court below the respondent relied solely, as stated in the certificate (R. 3), upon the decision of

the Ninth Circuit in *Bank of America v. Commissioner*, 90 F. (2d) 981, affirming the decision of the Board of Tax Appeals in 34 B. T. A. 684. That case, however, is readily distinguishable and is not considered binding by the court, as indicated in its certificate, for two reasons:

In the first place, it was stipulated in that case before the Board, and, therefore, conclusively determined for the purpose of record on appeal "that decedent actually took out the policies on his life." For this reason it was held by the majority opinion that it was doubtful if the Regulations were applicable, the court stating, "Since that fact was stipulated, it would seem that the case was ended when the stipulation was agreed upon."

In the second place, the record did not show who was the beneficiary of the policies, and, therefore, while it appeared that the premiums were paid with community funds, in the absence of information in the record as to the beneficiary, it was not possible to bring the situation within the scope of Article 25, Regulations 70, providing that a policy is deemed not to be taken out by the decedent to the extent that the premiums thereon are paid by the beneficiary. Because of the absence of a showing on that point the majority opinion refused to consider the applicability of Article 25, Regulations 70, saying, "We do not know who the beneficiary was. Therefore the provision is not in question."

It was further suggested in that case that the provisions of local law have no effect in the determination of the question. That view, however, is now

rejected by the court in submitting its certificate (Tr. 4). The expression was not necessary to the decision of the case, and appears to have been given without adequate consideration. While it is true, of course, that the federal law is paramount so far as it goes, and, therefore, controlling in the case of conflict with local rule or statute, this view does not apply where there is no conflict, and particularly where the application of the Federal Act necessarily requires a consideration of property rights and interests to determine its effect.

Sharp Estate, decided March 14, 1938. No. 558. October Term, 1937, 384 C. C. H. § 9184;

Helvering v. Bullard, decided February 28, 1938, 82 L. ed. 572;

Blair v. Commissioner, 300 U. S. 5, 57 S. Ct. 330, 81 L. ed. 465;

Freuler v. Helvering, 291 U. S. 35, 54 S. Ct. 308, 78 L. ed. 634;

Tyler, v. U. S. 281 U. S. 497, 50 S. Ct. 356, 74 L. ed. 991, 69 A. L. R. 758 at 764;

Helvering v. Parker (Eighth Circuit) 84 F. (2d) 838;

Pennsylvania Co., etc. v. Commissioner (Third Circuit) 79 F. (2d) 295, Cert. Den. 296 U. S. 651, 56 S. Ct. 310, 80 L. ed. 463;

Johnstone v. Commissioner (Ninth Circuit) 76 F. (2d) 55, 58;

Levy's Estate v. Commissioner (Second Circuit) 65 F. (2d) 412.

A great many other decisions have recognized and applied the same principle, an outstanding example being *Poe v. Seaborn*, 282 U. S. 101, 51 S. Ct. 58, 75 L. ed. 239, and others of the group of so-called community property cases determining the extent of the income of the taxpayer by the application of the principles of the local law.

The only other court decision bearing directly on this subject is *Newman v. Commissioner* (Fifth Circuit) 76 F. (2d) 449, cert. den. 296 U. S. 600, 56 S. Ct. 116, 80 L. ed. 425. That case arose under the laws of Louisiana and confirmed a decision of the Board of Tax Appeals, 29 B. T. A. 53. The policies had been issued after marriage, premiums paid with community funds, and the beneficiary was the wife, with right of change of beneficiary reserved to the insured. It had been conceded before the Board that the proceeds of the policies formed no part of the community estate, and, in concluding its opinion, the Board stressed particularly that the admission that the premiums were paid out of community income did not necessarily mean that the wife had paid a half thereof, and, therefore, the provisions of Article 25, Regulations 70, were apparently considered inapplicable. The opinion does not discuss the principles involved or the decision of the Board at any length. It said:

> "* * * The tax is not upon the proceeds of the policies; it is not upon the interest to which the beneficiary succeeded at death, but upon *the right of disposition and control* the insured had at death. There was no gift here *inter vivos.* The decedent possessed, until his death, the *full right*

to change the beneficiary. *The tax rests on this fact.*" (Italics ours)

The court considered but expressly refrained from deciding the question of validity of Regulations 70 as applicable to insurance, but held them inapplicable under the Louisiana law, because "the transaction is regarded as a gift from the husband to the wife, and the estate of neither is regarded as having paid the premiums so as to be entitled to reimbursement on account of their payment." The discussion and citations, and particularly the dissenting opinion, indicate that the court considered the interests as in the nature of a joint tenancy and that the husband had a beneficial or property interest in the whole, which sustained the tax. This also was apparently the theory of the Board in the decision of the instant case, as it cited in general support of its holding, ~~77 Fed. 1066,~~ *Lang v. Commissioner*, 289 U. S. 109, 53 S. Ct. 534, 77 L. ed. 1066, and *Levy's Estate v. Commissioner* (Third Circuit) 65 F. (2d) 412; Cf. *Edmonds, Adm., v. Commissioner* (Ninth Circuit) 90 F. (2d) 14. That principle, however, is not applicable to the community property interest of the wife under the laws of the State ~~of~~ Washington.

Joint tenancy with the right of survivorship, which in the case of husband and wife is also known as tenancy by the entirety (30 C. J. 565; Hu[illegible], Federal Death Tax, § 41) has been expressly abolished by statute in the State of Washington. Remington's Revised Statutes, § 1344 (Appendix A). While the community is often referred to as *sui generis*, the rights of the wife are essentially comparable to those

of a tenant in common, and although the statutory right of agency is given to the husband, the wife's right is a vested, individual ownership, which is not enlarged or affected in a substantive sense by the death of the husband. The theory upon which the right of a survivor of a joint tenancy is subject to taxation has no application to this case, where the wife, under the laws of the State of Washington, has an absolute proprietary interest in a community half of the proceeds.

While the *Newman* decision was not noticed in *Walker v. U. S.*, 83 F. (2d) 103, it is completely at variance therewith.

A vigorous dissent was written by Sibley, C. J., in the *Newman case*, 76 F. (2d) 449, and by Wilbur, C. J., in *Bank of America v. Commissioner* (Ninth Circuit) 90 F. (2d) 981, and we urge upon this court the correctness of the views therein expressed.

It is interesting to note that in *Carroll v. Commissioner*, 29 B. T. A. 11, decided only a few days prior to the Board's decision in the *Newman* case, and arising also in Louisiana, it was held that the cash surrender value of policies taken out after marriage by the husband, with proceeds payable to his estate, constitute a community asset, and upon the death of the wife one-half of the cash surrender value should be included in the value of her estate. It seems impossible to reconcile this holding with that in the *Newman* case, and it leads to some significant considerations. Undoubtedly, if the policies in this case had been surrendered the day before death and the proceeds made available prior thereto, one-half there-

of, to the extent premiums were paid with community funds, would belong to the wife by virtue of her community interest, and would not be subject to inclusion in the decedent's estate. It is impossible to see any basis for distinction or for a different result where, instead of receiving the cash surrender value, the proceeds should become payable upon the decedent's death on the following day.

Wife's Interest Was Not Subject to Husband's Control

By the changes made in Regulations 80, Articles 25-28, and by his contentions made in the cases above-noted, the Commissioner has advanced the proposition of basing the tax upon the economic interest, or control, or benefits reserved to the insured, which cease at the time of his death, irrespective of who pays the premiums. This theory requires a consideration of the beneficial rights and interests of the husband and wife under the law of Washington, and of what economic control or interest must be found in the husband, as to the wife's community half, to justify the application of the rule.

Hughes, on Federal Death Tax, § 67, p. 111, says:

> "The established administrative policy of the Department as evidenced in its Regulations, the constant re-enactment by Congress of revenue acts with knowledge of those regulations constituting an approval thereof, together with uniform Court and Board decisions so holding, establish that insurance in which the insured has reserved none of the incidents of ownership is not taxable."

In Regulations 80, Article 25, respondent defines the legal incidents of ownership of insurance as including "the right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from an insurer the surrender value of the policy, etc." If none of such incidents of ownership were retained by the deceased, there would be nothing to support the tax on the proceeds. *Heiner v. Donnan*, 285 U. S. 312, 52 S. Ct. 358, 76 L. ed. 772, which applies by analogy *Hoeper v. Tax Commission*, 284 U. S. 206, 52 S. Ct. 120, 76 L. ed. 248, as forbidding the imposition of the tax where measured by or based upon the value of property in which the taxpayer had no interest or control for his own benefit. A tax so levied would be violative of the Fifth Amendment.

The tax is laid upon the transfer or shifting of an economic interest or control from the decedent occasioned by his death.

> "It is of significance, although not conclusive, that the only section imposing the tax, section 401, does so on the net estate of decedents and that the miscellaneous items of property required by section 402 to be brought into the gross estate for the purpose of computing the tax, unless the present remainders be an exception, are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death. They are property held by the decedent in joint tenancy or by the entirety, property of another

subject to the decedent's power of appointment and insurance policies effected by the decedent on his own life, payable to his estate or to others at his death."

Reinecke v. Northern Trust Co., 278 U. S. 339, 49 S. Ct. 123, 73 L. ed. 410.

It is the termination of the power of control or disposition of rights under the policy or to the proceeds thereof or the freeing of the interest of the beneficiary from the control of the insured that justifies inclusion of the proceeds in the gross estate. In *Chase National Bank v. U. S.*, 278 U. S. 327, 49 S. Ct. 126, 73 L. ed. 405, it is said that:

"* * * it is the termination of the power of disposition of the policies by decedent at death which operates as an effective transfer and is subject to the tax."

If no interest passes to the beneficiary as a result of the death of the insured, there is no basis for inclusion of the proceeds in the gross estate. *Bingham v. U. S.*, 56 S. Ct. 180, 296 U. S. 211, 80 L. ed. 160, approving *Bingham v. U. S.*, 7 Fed Supp. 907. In *Levy's Estate v. Commissioner* (Second Circuit) 65 F. (2d) 412, the court applied such principles to exempt from inclusion in the gross estate the proceeds of policies payable to the wife in which, under the law of New York, her interest could not be affected without her consent. The case is similar with respect to the wife's proprietary interest in her community half of the insurance in this case.

To the same effect as applied to tenancy by the entirety see *Tyler v. U. S.*, 281 U. S. 497, 50 S. Ct. 356,

74 L. ed. 991, 69 A. L. R. 758; *Levy v. Wardell*, 258 U. S. 542, 42 S. Ct. 395, 66 L. ed. 758; and *Shukert v. Allen*, 273 U. S. 545, 47 S. Ct. 461, 71 L. ed. 764.

As to the policy taken out before the decedent's marriage in 1905 and therefore long prior to the Estate Tax Act, it is doubtful if the proceeds are subject to the Act and to inclusion in the gross estate to any extent under the doctrine of *Lewellyn v. Frick*, 268 U. S. 238, 45 S. Ct. 487, 69 L. ed. 934, and *Bingham v. U. S.*, 296 U. S. 211, 56 S. Ct. 180, 80 L. ed. 160. See also Hughes on Federal Death Tax, § 62, p. 104-5; *Industrial Trust Co. v. U. S.*, 296 U. S. 220, 56 S. Ct. 182, 80 L. ed. 191, and *Wyeth v. Crooks*, 33 F. (2d) 1018.

Under the settled principles of community property law of the State of Washington, the wife has a vested, equal interest in the policy and proceeds of insurance so far as paid for with community funds. As to her share, the husband has no right or interest of his own but is only the statutory agent to manage the common property for the benefit of the community. As against the wife's interest, he has none of the legal incidents of ownership defined in Regulations 80, Article 25. It necessarily follows that as to the wife's half, no transfer, generation of new rights or interest, or removal of restrictions or control results from the death of the husband which will sustain the inclusion of her community interest in his gross estate.

For the above reasons, therefore, it necessarily follows that there should be excluded from the husband's gross estate one-half of the proceeds of the

policy on which the premiums were entirely paid with community funds, and as to the policy taken out before marriage, one-half of so much of the proceeds as is in proportion to the amount of premiums paid after marriage with community funds.

Policy Payable to Children Not Part of Husband's Estate to Extent of Wife's Community Interest

The foregoing disposes of the questions arising under policies in which the wife is the beneficiary. There is left for consideration the case of a policy payable to the decedent's children, premiums on which have been maintained with community funds. While the provisions of Article 25 of Regulations 70 are not strictly applicable, because the beneficiary has not paid the premiums, the result under the rule of economic interest and incidents of ownership should be the same and only one-half thereof should be included in the decedent's estate, subject to deduction of $40,000.00. In such case one-half of the premiums have been paid by the wife and not by the decedent. One-half of any interest, right, control and power of disposition belong in a substantive sense to her and are not subject to the will of the husband for his own benefit any more than in the case of the policy where she is the beneficiary. Such a policy is not within the scope of the cases sustaining the tax on insurance created by the deceased and subject to his control, or of Article 23 of the Regulations defining the intent of the statute as restricted to such part or proportion as "is represented by an outlay of funds, which, in the first instance, were decedent's own."

The situation in such a case is no different than if half of the insurance had been applied for and maintained by an entire stranger acting through the decedent as his agent.

CONCLUSION

Upon application of the foregoing principles, petitioners submit that the answers to the questions propounded should be as follows:

Question No. 1: One-half.
Question No. 2: No.
Question No. 3: Yes.
Question No. 4: Yes.
Question No. 5: Yes.

Respectfully,

H. B. JONES,
ROBERT E. BRONSON,
Counsel for Petitioners.

APPENDIX A

Provisions of Remington's Revised Statutes of Washington, relating to property interests of husband and wife:

§ 6890. *Separate property of husband.* Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried.

§ 6891. *Separate property of wife.* The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property, to the same extent and in the same manner that her husband can, property belonging to him.

§6892. *Community property defined—Husband's control of personalty.* Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

§ 6893. *Community realty, conveyance of, etc.* The husband has the management and control of the community real property but he shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife: Provided, however, that all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon.

§ 6897. *Tenancy in dower and by curtesy abolished.* No estate is allowed the husband as tenant by curtesy, upon the death of his wife, nor is any estate in dower allotted to the wife upon the death of her husband.

§ 6898. *Liberal construction.* The rule of common law that statutes in derogation thereof are to be strictly construed has no application to this chapter. This chapter establishes the law of the state respecting the subject to which it relates, and its provisions and all proceedings under it shall be liberally construed with a view to effect its object.

§ 1344. *Survivorship between joint tenants abolished.* If partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but descend, or pass by devise, and shall be subject to debts and other legal charges, or

transmissible to executors or administrators, and be considered, to every intent and purpose, in the same view as if such deceased joint tenant had been tenants in common: Provided, that community property shall not be affected by this section.

APPENDIX B

Regulations 70 (1929 edition) relating to Estate Tax under the Revenue Act of 1926:

GROSS ESTATE—INSURANCE

> Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated— * * *
>
> (g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life. * * *

Art. 25. *Taxable Insurance.*—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.

The term "insurance" refers to life insurance of every description, including death benefits paid by

fraternal beneficial societies, operating under the lodge system. Insurance is deemed to be taken out by the decedent in all cases where he pays all the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance is not deemed to be taken out by the decedent, even though the application is made by him, where all the premiums are actually paid by the beneficiary. Where a portion of the premiums were paid by the beneficiary and the remaining portion by the decedent the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total of premiums paid.

Art. 26. *Insurance in favor of the estate.*—The provision requiring the inclusion in the gross estate of all insurance receivable by the executor, without any deduction, applies to policies made payable to the decedent's estate or his executor or administrator, and all insurance which is in fact receivable by, or for the benefit of, the estate. It includes insurance taken out to provide funds to meet the estate tax, and any other taxes or charges which are enforceable against the estate. The manner in which the policy is drawn is immaterial so long as there is an obligation, legally binding upon the beneficiary, to use the proceeds in payment of such taxes or charges. Where the decedent took out insurance in favor of another person or corporation as collateral security for a loan or other accommodation, and either directly or indirectly paid the premiums thereon, the insurance is deemed to be receivable for the benefit

of the estate. The amount of the loan outstanding at decedent's death, with interest accrued thereon to that date, will be deductible in determining the net estate. (See Art. 29.)

Art. 27. *Insurance receivable by other beneficiaries.*—All insurance in excess of $40,000 receivable by beneficiaries other than the estate, regardless of when taken out, must be included in the gross estate where the decedent during his life retained legal incidents of ownership in the policies of insurance, as, for example, a power to change the beneficiary, to surrender or cancel the policies, to assign them, to revoke an assignment of them, to pledge them for loans, or to dispose otherwise of them and their proceeds *for his own benefits*, etc.

However, irrespective of the retention of such legal incidents of ownership, all insurance in excess of $40,000 receivable by beneficiaries other than the estate must be included in the gross estate (1) of any decedent dying after the enactment of the Revenue Act of 1924, where such insurance was taken out, or the beneficiary receiving the proceeds was named, after the enactment of the Revenue Act of 1918, and (2) of any decedent dying after the passage of the Revenue Act of 1918, but before the effective date of Title III of the Revenue Act of 1924, where such insurance was taken out, or the beneficiary receiving the proceeds was named, after the enactment of the particular revenue act in force and effect at the time of such a decedent's death.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries

other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

Art. 28. *Valuation of insurance.*—The amount to be returned where the policy is payable to or for the benefit of the estate is the amount receivable. Where the proceeds of a policy are payable to a beneficiary other than to or for the benefit of the estate, and all the premiums were paid by the decedent, the amount to be listed on Schedule C of the return is the full amount receivable, but where the proceeds are so payable *and only a portion of the premiums were paid by the decedent, the amount to be listed on such schedule is that portion of the insurance receivable which the premiums paid by the decedent bear to the total premiums paid.* In cases where the proceeds of a policy are made payable to the beneficiary in the form of an annuity for life or for a term of years, the present worth of the annuity at the time of death should be included in the gross estate. For the method of computing the value of such an annuity, see Article 13, subdivision (10). Where the insurance contract gives the right to receive a fixed sum of money in lieu of an annuity, or other optional settlement, this fixed sum represents the value of the insurance for the purpose of the tax.

Regulations 80 (1937 Ed.) relating to Estate Tax under the Revenue Acts of 1926 and 1932, as amended.

Sec. 302 (as amended by section 404 of the Revenue Act of 1934). The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated [except real property situated outside the United States—] * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life. * * *

Art. 25. *Taxable insurance.*—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (*a*) All insurance receivable by, or for the benefit of, the estate; (*b*) all other insurance to the extent that it exceeds in the aggregate $40,000.

The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is considered to have been taken out by the decedent, whether or not he made the application, if he acquired the ownership of, or any legal incident thereof in, the policy; but in the case of a decedent dying before November 7, 1934 (the date of approval of the 1934 edition of Regulations 80), the provisions of the second paragraph of article 25 of

Regulations 70 (1929 edition) will continue to apply. Legal incidents of ownership in the policy include, for example: The right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc.

Art. 26. *Insurance in favor of the estate.*—The provision requiring the inclusion in the gross estate of all insurance receivable by the executor, without any exemption, applies to policies made payable to the decedent's estate or his executor or administrator, and all insurance which is in fact receivable by, or for the benefit of, the estate. It includes insurance taken out to provide funds to meet the estate tax, and any other taxes or charges which are enforceable against the estate. The manner in which the policy is drawn is immaterial so long as there is an obligation, legally binding upon the beneficiary, to use the proceeds in payment of such taxes or charges. If the decedent took out insurance in favor of another person or corporation as collateral security for a loan or other accommodation, the insurance is considered to be receivable for the benefit of the estate. The amount of the loan outstanding at decedent's death, with interest accrued thereon to that date, will be deductible in determining the net estate. (See article 29).

Art. 27. *Insurance receivable by other beneficiaries.*—The statute requires the inclusion in the gross estate of the decedent of the proceeds of any policy, or the aggregate proceeds of all policies, not receivable by or

for the benefit of decedent's estate, to the extent that such proceeds exceed $40,000, regardless of when the policy was or the policies were issued, if the decedent possessed at the time of his death any of the legal incidents of ownership.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in the appropriate schedule of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

Art. 28. *Valuation of insurance.*—The amount to be returned if the policy is payable to or for the benefit of the estate is the amount receivable. If the proceeds of a policy are payable to a beneficiary other than to or for the benefit of the estate, the amount to be listed in the appropriate schedule of the return is the full amount receivable. (For taxable portion see article 27). In case the proceeds of a policy are made payable to the beneficiary in the form of an annuity for life or for a term of years, there should be listed in the appropriate schedule of the return the one sum payable at death under an option which could have been exercised either by the insured or by the beneficiary, or if no option was granted, the sum used by the insurance company in determining the amount of the annuity. * * *

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CITATIONS

Cases:

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OCTOBER TERM, 1937

No. 919

RICHARD E. LANG, EXECUTOR, AND GRACE E. LANG, EXECUTRIX, OF THE ESTATE OF JULIUS C. LANG, DECEASED

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE COMMISSIONER

OPINION BELOW

The opinion of the United States Board of Tax Appeals is reported in 34 B. T. A. 337.

JURISDICTION

The certificate of the Circuit Court of Appeals, as amended, was filed in this Court on April 2, 1938. Jurisdiction is conferred on this Court by Section

239 of the Judicial Code, as amended by the Act of February 13, 1925:[1]

QUESTIONS CERTIFIED

1. A husband and wife were at all pertinent times residents of the State of Washington, and the husband, during marriage, applied for a policy of insurance on his own life (which policy was to be payable to beneficiaries other than his estate or his representatives), and, from funds of the community, paid the first premium thereon, required to be paid prior to or concurrent with the issue of the policy, and thereafter received the policy, and all subsequent premiums on such insurance were paid for solely with community funds of the husband and his wife, and the husband, while both spouses resided in the State of Washington, thereafter died.

In such a situation, in determining the amount of insurance, if any, in excess of $40,000, to be included in the gross estate of the deceased husband to be subject to the estate tax under the estate tax provisions of the Revenue Act of 1926, and particularly Section 302 (g) thereof, is the entire amount of the insurance in the last sentence described, or only one-half thereof, deemed to be "taken out by" the husband and to be included in the amount in his estate?

2. A resident of the State of Washington, being unmarried, applies for and receives a policy of in-

[1] See *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716.

surance upon his own life, which policy is payable to beneficiaries other than his estate or his representatives, and pays premiums thereon out of his separate property, and subsequently is married, and, while being married and a resident of the State of Washington, pays further premiums on such policy out of community funds of himself and his wife, and while both are residents of the State of Washington the husband dies.

In this situation, in determining the amount of insurance, if any, in excess of $40,000 in the gross estate of the deceased husband, sought to be taxed under the estate tax provisions of the Revenue Act of 1926, and particularly Section 302 (g) thereof, should it be computed by inclusion of that portion of the insurance which is paid for by premiums paid from community funds of the husband and wife?

3. If the answer to the last question be in the negative, should the amount of insurance to be included be that proportion thereof which the premiums paid by the husband out of the funds other than those of the community bear to the total premiums paid plus one-half the remaining insurance?

4. Incorporating herein by reference the facts stated in question 1, there is added the further fact that the decedent's surviving spouse is the sole beneficiary of the said insurance policy. If the answer to question 1 be that the entire amount of the insurance there described is to be deemed "taken out by" the husband and deemed to be in-

cluded in the amount of his estate, does the inclusion of the additional fact herein stated require that only one-half of said insurance is so to be deemed?

5. Incorporating herein by reference the facts stated in question 2, there is added the further fact that the decedent's surviving spouse is the sole beneficiary of said policy. If the answer to question 2 be in the affirmative, does the inclusion of the additional fact herein stated require that one-half of that portion of the insurance which was paid for out of community funds of the decedent and his wife be excluded from the gross estate of the decedent?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in Appendices A and B, *infra*, pp. 45–55.

STATEMENT

The certificate of the Circuit Court of Appeals sets forth the following facts (pp. 1–2):

The decedent, Julius C. Lang, died in 1929, a citizen and resident of the State of Washington. At the time of his death there were in force and effect seventeen policies of insurance on his life. They totaled more than $200,000. His wife was the beneficiary of fourteen of the policies and his children were beneficiaries of the other three. All the policies required the payment of premiums in advance and acknowledged the receipt of the first premium.

From 1905 until the date of his death the decedent was married and he and his wife, who survives him, were citizens of Washington, where the community property law obtains. Fourteen of the policies (including the three payable to his children) were applied for by him during his marriage, and all of the first premiums paid upon issuance of the policies as well as all subsequent premiums were paid from the community funds of the decedent and his wife. The remaining three were issued to him before his marriage. The first few premiums on these three were paid by him out of his separate property and the remainder were paid out of community funds.

The Commissioner of Internal Revenue determined a deficiency in estate tax based upon his ruling that under Section 302 (g) of the Revenue Act of 1926 the entire proceeds of the policies should be included in the gross estate, subject to the $40,000 exemption.

SUMMARY OF ARGUMENT

I

The life insurance policies involved in this case are all payable to beneficiaries other than the decedent's estate, and the questions certified admit that but for the circumstance that the premiums were paid from community funds of the decedent and his wife the total proceeds of the policies would be included in the gross estate to the extent that they exceed the exemption of $40,000. The ques-

tion is whether a part of the insurance proceeds should be excluded for the reason that part of the premiums on some of the policies and all of the premiums on the remaining policies were paid out of community funds.

Section 302 (g) of the Revenue Act of 1926 provides in substance that the proceeds of insurance policies payable to specific beneficiaries are to be included in the gross estate when the policies are "taken out by the decedent upon his own life." In terms it contains no exception based upon the fact that the decedent has not paid the premiums. Much less does it provide that the payment of premiums from a fund in which someone else has an interest shall operate to exclude a part of the proceeds proportionate to that interest from the gross estate. The Treasury regulations have never provided that any part of the proceeds of policies are to be excluded where someone other than the decedent, but not the beneficiary, has paid part of the premiums. The courts have held that all of the proceeds are to be included in such cases. Hence with respect to the policies made payable to the decedent's children the mere fact that all of the premiums were paid from community funds does not require that part of the proceeds be excluded.

The remaining policies in this case were made payable to the wife, and Article 25 of Regulations 70 (1929 Ed.), which, if valid, was in effect at the date of the decedent's death, provides that insurance is not deemed to be taken out by the decedent,

even though the application is made by him, where all the premiums are actually paid by the beneficiary; and further provides that where a portion of the premiums are paid by the beneficiary and the remaining portion by the decedent, the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total amount of the premiums paid. Similar provisions were incorporated in earlier regulations. Those regulations have been sustained by the courts.

If we accept the suggestion of the court below that the community is a separate entity like a corporation, Article 25 of Regulations 70 would have no application to this case. Under that theory the premiums on the policies have been paid by the community as a legal entity and the wife individually is the beneficiary. But we do not believe that the fiction that the community is a legal entity should be accepted for tax purposes and do not rely upon this argument.

There is support for the view that Article 25 of Regulations 70 does not prevent the inclusion in the decedent's gross estate of the proceeds of the policies payable to his wife, for the reason that the decedent himself actually paid the premiums even though he used community funds.

But even if it be considered that the wife paid half of such premiums, Article 25 of Regulations 70 should not control. That article unduly restricts Section 302 (g) of the Revenue Act of 1926 and is

invalid. The qualifying phrase "taken out by the decedent" has no fixed meaning and in using it Congress undoubtedly intended to exercise its constitutional power to tax the proceeds of insurance policies made payable to specific beneficiaries to the fullest extent possible. That intention would seem to require the inclusion in the gross estate of the proceeds of policies on the decedent's life when he retains the right to change the beneficiary or other incidents of ownership, regardless of who pays the premiums. This construction has been adopted under later regulations (see Article 25, Regulations 80 (1934 Ed.), Appendix A, *infra,* p. 48), and states the correct rule. A wife does not buy an interest in an insurance policy by paying part of the premiums, where the decedent reserves the right to change the beneficiary and other incidents of ownership.

We recognize the rule of construction which requires great weight to be given to a Treasury regulation which has continued in effect after there has been an enactment of another statute similar to that construed by the regulations; but a rule of construction cannot serve to perpetuate a regulation which unduly restricts the statute and is inconsistent with it. Article 25 of Regulations 70 is both inconsistent with the statute and unreasonable and should be set aside.

II

Both with respect to the policies made payable to the wife and those made payable to the children

the issue is whether the fact that all or a portion of the premiums were paid from community funds deprived the decedent husband of the incidents of ownership and control of the policies on his life which he otherwise had. Incidents of ownership include the right to change the beneficiary, to surrender and cancel the policies, to pledge them as security for loans, and to dispose of them and the proceeds for his own benefit during his life.

Under the laws and decisions of the State of Washington the husband has the complete and exclusive right to manage, control, and dispose of community personal property, with the qualification that he cannot devise by will more than one-half of such property. The test as to whether his contracts relating to community personal property bind the community is whether they were made in the course of his management for the benefit of the community, and not whether they are of actual benefit to it. The statute does not even provide that he cannot give away community property without his wife's consent, although the decisions hold that he cannot give away a substantial amount. In any case, the burden of proof is upon the wife when she seeks to interfere.

There are few Washington decisions dealing with the wife's interest in proceeds of insurance policies the premiums on which are paid with community funds. We have found none indicating that she

may claim an interest in policies originally made payable to the decedent's children or other beneficiaries, where the decedent has reserved the right to change the beneficiaries. In the absence of any such decisions, it must be concluded that the husband who applied for the policies and named the beneficiaries retained all the incidents of ownership which he would have had if he had used his separate funds in paying the premiums.

The law with reference to policies which are made payable to the wife is not well settled. In one case the Supreme Court of Washington held that a wife could not claim an interest in a benefit certificate originally made payable to her, where the decedent had changed the beneficiary without her knowledge and the premiums were paid with community funds. In a later case, involving a regular life insurance policy, a divided court held, under similar circumstances, that she could recover. We do not believe that the decision in the second case represents a sound application of the Washington law. But even if it is controlling, it stands merely for the principle that the change of beneficiary in such a case would be effective so long as the wife did not assert a claim; in other words, that the beneficiary would acquire an interest in the policy subject to its being defeated.

It has been held in the Washington decisions that the wife as beneficiary acquires no vested interest in policies which are made payable to her subject to the right of the husband to change the bene-

ficiary, even where part of the premiums are paid with community funds. He may change the beneficiary under such a policy to another for a consideration, as, for example, for his own support, and he may assign it for a consideration. It may be argued that he can do so only for a consideration flowing to the community, but such an argument loses sight of the fact that the husband's purposes and the community's are practically identical and that he could assign the policy to pay his own personal expenses. Under those circumstances, the decedent retains sufficient incidents of ownership to render the policies subject to the Federal estate tax.

ARGUMENT

I

UNDER SECTION 302 (G) OF THE REVENUE ACT OF 1926 NO PART OF THE PROCEEDS OF INSURANCE ON THE DECEDENT'S LIFE SHOULD BE EXCLUDED FROM HIS GROSS ESTATE MERELY BECAUSE THE PREMIUMS WERE PAID FROM COMMUNITY FUNDS IN WHICH HIS WIFE HAD AN INTEREST

The certificate presents various questions as to whether the fact that the premiums are paid from community funds of a husband and wife domiciled in the State of Washington affects the extent to which the proceeds of an insurance policy on the husband's life may be included in his gross estate for Federal estate tax purposes. The policies in question are all payable to beneficiaries other than the decedent's estate and the questions certified ad-

mit that but for the circumstance that the premiums were paid from community funds, the total proceeds of the policies would be included in the gross estate to the extent that they exceed the exemption of $40,000. See Section 302 (g) of the Revenue Act of 1926 (Appendix A, *infra*, p. 45). The only question is whether a proportionate part of the proceeds of any policy, the premiums on which were paid out of community funds is to be excluded.

We shall discuss first the question whether the mere fact that the premiums are paid from community funds operates to exclude part of the proceeds of the policies payable to beneficiaries other than the wife (in this case, to the decedent's children). With reference to the policies which are payable to the wife, additional problems arise.

(A) *The policies payable to beneficiaries other than the wife*

Section 302 of the Revenue Act of 1926 provides in part that there shall be included in the gross estate of the decedent the value of all property, real or personal, tangible or intangible, wherever situated—

> (g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

The statute in terms provides that the proceeds of insurance policies payable to specific beneficiaries are to be included in the gross estate when the policies are "taken out by the decedent upon his own life." In terms it contains no exception based upon the fact that the decedent has not paid the premiums. Much less does it provide that the payment of premiums from a fund in which someone else has an interest shall operate to exclude a part of the proceeds proportionate to that interest from the gross estate.

The legislative history of the provision does not indicate that Congress had any exceptions of that character in mind. In enacting Section 402 (f) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, the first statute to contain a provision for including the proceeds of policies payable to specific beneficiaries, the House Committee on Ways and Means said in its report (H. Rep. No. 767, 65th Cong., 2d Sess., p. 22):

> The gross estate section has been amended to specifically include (1) insurance receivable by the executor under policies taken out by the decedent upon his own life and (2) insurance in excess of $40,000 receivable by all specific beneficiaries under policies taken out by the decedent upon his own life. (1) Insurance payable to the executor or to the estate is now regarded as falling within section 202 (a) of the existing statute and this construction of the existing statute is now

> written into the new bill for the sake of clearness. The amendment will serve the further purpose of putting on notice those who acquaint themselves with the statute for the purpose of making more definite plans for the disposition of their property. (2) The provision with respect to specific beneficiaries has been included for the reason that insurance payable to such beneficiaries usually passes under a contract to which the insurance company and the individual beneficiary are the parties in interest and over which the executor exercises no control. Amounts passing in this way are not liable for expenses of administration or debts of the decedent and therefore do not fall within the existing provisions defining the gross estate. It has been brought to the attention of the Committee that wealthy persons have and now anticipate resorting to this method of defeating the estate tax. Agents of insurance companies have openly urged persons of wealth to take out additional insurance payable to specific beneficiaries for the reason that such insurance would not be included in the gross estate. A liberal exemption of $40,000 has been included and it seems not unreasonable to require the inclusion of amounts in excess of this sum.

The Treasury regulations have never attributed any significance to the payment of premiums by persons other than the decedent, except in cases where the premiums are paid by the beneficiary.

Article 25 of Regulations 70 (1929 Ed.), Appendix A, *infra*, p. 46, provided that insurance was not deemed to have been taken out by the decedent where all the premiums were paid by the beneficiary, and provided further that where a portion of the premiums were paid by the beneficiary and the remaining portion by the decedent the insurance would be deemed to have been taken out by the latter in the proportion that the premiums paid by him bore to the total premiums paid. Those regulations were silent as to the payment of premiums by any other person. These provisions were changed in Article 25 of Regulations 80 (1934 Ed.), *infra*, to provide that the insurance is considered to have been taken out by the decedent "in all cases, whether or not he makes the application, if he pays the premiums either directly or indirectly, or they are paid by a person other than the beneficiary, or decedent possesses any of the legal incidents of ownership in the policy." We shall hereinafter discuss the effect of these regulations with reference to the policies payable to the wife, who was the beneficiary under fourteen of the policies here involved. At this point we merely wish to emphasize that neither Regulations 70 nor the later regulations have provided that the proceeds of an insurance policy payable to a specific beneficiary are to be excluded, in whole or in part, when the premiums are paid, in whole or in part, by some person other than the decedent but not by the beneficiary. Nor have they provided that the proceeds

are to be excluded in part when the premiums are paid by the decedent out of a fund in which another not the beneficiary has an interest.

With the single exception of the decision in *Wilson* v. *Crooks*, 52 F. (2d) 692 (W. D. Mo.), the courts have uniformly held that the fact that someone other than the decedent, but not the beneficiary, has paid the premiums on an insurance policy on the decedent's life is not a ground for excluding the proceeds from the decedent's gross estate. *Millie Belle Brown* v. *Commissioner* (C. C. A. 6th), decided March 11, 1938, not yet officially reported, but found in 1938 C. C. H., Vol. 4, Par. 9178; *Bank of America Nat. T. & Sav. Ass'n* v. *Commissioner*, 90 F. (2d) 981 (C. C. A. 9th). See also *Newman* v. *Commissioner*, 76 F. (2d) 449 (C. C. A. 5th), certiorari denied, 296 U. S. 600; *Bromley* v. *Commissioner*, 16 B. T. A. 1322. In the *Newman* and *Bank of America* cases it was directly held that the proceeds of insurance policies payable to specific beneficiaries were to be included in the gross estate, notwithstanding the fact that the decedents paid the premiums from funds which constituted community property under the laws of California and Louisiana. There are distinctions which may be drawn between the *Newman* case, the *Bank of America* case, and this case, which are discussed hereinafter (*infra*, pp. 22, 37), but under the laws of all three States involved the wife has a vested interest in the community property. See *Poe* v. *Seaborn*, 282 U. S. 101; *Bender* v. *Pfaff*, 282 U. S. 127;

United States v. *Malcolm,* 282 U. S. 792. Hence, those cases are authority for the principle that the mere fact that the premiums on policies on the husband's life are paid with community funds is not enough to exempt part of the proceeds from the tax.

If the proceeds of a policy would not be exempt in a case where the decedent took out insurance on his life and the premiums were actually paid by another (*Millie Belle Brown* v. *Commissioner, supra*), we submit that there is less justification for holding the proceeds exempt where the premiums have been paid by the husband from community funds. In such a case, while the payment is made from funds in which the wife has a vested interest, the husband has power to control and manage the funds (*Poe* v. *Seaborn, supra*) and he makes the actual payment.

In principle we see no distinction between taxing as a part of the decedent's gross estate proceeds of insurance on his life which have been paid for by someone else and taxing the value of property passing under a general power of appointment exercised by the decedent, where the trust creating the power has been established by someone else. See Section 302 (f) of the Revenue Act of 1926; *Commissioner* v. *Nevius,* 76 F. (2d) 109 (C. C. A. 2d), certiorari denied, 296 U. S. 591; *Old Colony Trust Co.* v. *Commissioner,* 73 F. (2d) 970 (C. C. A. 1st); *Blackburne* v. *Brown,* 43 F. (2d) 320 (C. C. A. 3d); *Johnstone* v. *Commissioner,* 76 F. (2d) 55 (C. C. A. 9th), certiorari denied, 296 U. S. 578;

Fidelity-Philadelphia Trust Co. v. *McCaughn,* 34 F. (2d) 600 (C. C. A. 3d), certiorari denied, 280 U. S. 602. See also *Helvering* v. *Grinnell,* 294 U. S. 153. In substance, a beneficiary of an insurance policy is an appointee of the insured. *Kincaid* v. *New York Life Ins. Co.,* 66 F. (2d) 268 (C. C. A. 5th); *Mutual Ben. Life Ins. Co.* v. *Swett,* 222 Fed. 200 (C. C. A. 6th). See also *Chase Nat. Bank* v. *United States,* 278 U. S. 327.

We submit, therefore, that the mere fact that the premiums on the policies payable to the children were paid from community funds of the husband and wife does not serve to exempt any part of the proceeds of those policies from the tax.

(B) *The policies payable to the wife*

Article 25 of Regulations 70 (1929 Ed), Appendix A, *infra,* p. 46, provides that insurance is not deemed to be taken out by the decedent, even though the application is made by him, where all the premiums are actually paid by the beneficiary, and further provides that where a portion of the premiums are paid by the beneficiary and the remaining portion by the decedent the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total amount of the premiums paid.[2]

[2] See, also, Article 28, Regulations 70 (1929 Ed.), *infra.* But in Article 27 of Regulations 70 (1929 Ed.), *infra,* it is provided that all insurance in excess of $40,000 must be included where the decedent during his life retained legal incidents of ownership.

Similar provisions had been incorporated in earlier regulations. See Article 25, Regulations 70 (1926 Ed.), and Article 25 of Regulations 68 (1924 Ed.). Under Article 25 of Treasury Regulations 80 (1934 Ed.), Appendix A, *infra*, p. 48, this provision was changed to provide that insurance is deemed to have been taken out by the decedent in all cases, whether or not he makes the application, if he pays the premiums, either directly or indirectly, *or* they are paid by a person other than the beneficiary, *or* the decedent possesses any of the legal incidents of ownership. The third of these criteria is made the sole test in Article 25 of Regulations 80 (1937 Ed.). In Article 110 of Regulations 80 (1934 Ed.), it was specifically provided that the regulations should apply to taxes imposed under the Revenue Act of 1926, as amended by the Revenue Act of 1928, except where the provisions of those statutes were different. But by Treasury Decision 4729, 1937-1 Cumulative Bulletin 284, Article 25 of Regulations 80 (1934 Ed.) was amended to provide that in the case of a decedent dying before November 7, 1934 (the date of approval of the regulations), the provisions of the second paragraph of Article 25 of Regulations 70 (1929 Ed.) would continue to apply. Hence, the provisions of Article 25 of Regulations 70 relating to the exclusion of part of the proceeds of insurance policies from the gross estate where the beneficiary has paid part of the premiums was in effect for the year 1929 when the decedent in this case died.

We concede also that this regulation has been sustained by the courts. *Walker* v. *United States*, 83 F. (2d) 103 (C. C. A. 8th); *Helvering* v. *Reybine*, 83 F. (2d) 215 (C. C. A. 2d).

The certificate of the court below suggests that under the Washington decisions the community is an entity like a corporation. If we accept the theory that in Washington the community funds are owned by a separate legal entity (see *Ostheller* v. *Spokane & Inland Empire R. Co.*, 107 Wash. 678, 685; *Mattinson* v. *Mattinson*, 128 Wash. 328), Article 25 of Regulations 70 would have no application to this case. Under that theory the premiums on the policies have been paid by the community as a legal entity, whereas the wife individually is the beneficiary, and no question of the exclusion of proceeds of a policy where the beneficiary has paid part of the premiums would be presented. We believe, however, that the theory that there is such a legal entity is a mere fiction, and that it has not been recognized for Federal tax purposes. *Poe* v. *Seaborn, supra.* There is no more reason for giving it controlling effect than there is for accepting the fiction that a husband and wife are one person in relation to tenancies by the entirety. See *Tyler* v *United States*, 281 U. S. 497.

It may be argued more forcefully that the regulation does not apply because the decedent himself actually paid the premiums, even though he paid them from community funds. A decedent

who had borrowed money or had been given money with which to pay premiums on a policy on his life would no doubt be considered as having "taken out" the insurance. Similarly, in this case the use of funds in which the wife had an interest could mean that she had lent or given the money for that purpose. In *Newman* v. *Commissioner, supra,* the court said (p. 452):

> Appellants with great confidence press the further argument that the case presented is, within articles 25 and 28, Treasury Regulations, a case of the payment of premiums in part by the beneficiary and in part by the decedent. They say this results from the operation in Louisiana of the community property system. That under its operation, as stipulated, the premiums the husband paid must be regarded as paid with community funds and therefore one-half by the insured, and one-half by his beneficiary. That this being so, it must be held that, within the meaning of the regulations, the beneficiary paid one-half of the premiums, and the decedent only one-half. That this contention is more logically than legally sound, we think a little reflection will show. We think it may well be doubted whether these regulations would be valid if so construed. They were adopted under a statute which does not in terms authorize any diminution on account of community payment of premiums, but on the contrary, in plain terms, requires that all over $40,000 of the proceeds of policies taken out by the insured

> in favor of the beneficiary, be included in his gross estate. In this view, it may well be doubted whether the regulations if so construed, would not be beyond administrative power. "The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it." *Miller* v. *United States,* 55 S. Ct. 440, 442, 79 L. Ed., —— March 4, 1935.

See also *Bank of America Nat. T. & Sav. Ass'n* v. *Commissioner, supra,* and compare *Helvering* v. *Reybine, supra,* and *Walker* v. *United States, supra.* While the court in the *Newman* case relied upon Louisiana decisions which hold that a contract of insurance is a contract *sui generis* and that when community funds are used to pay premiums on insurance on the husband's life the wife is not considered as having paid the premiums, we believe that its suggestion that the regulation was not intended to authorize any diminution on account of community payment of premiums is entitled to consideration.

But even if it must be considered that the wife in this case paid one-half of all the premiums paid with community funds, for the reason that under the decision in *Poe* v. *Seaborn, supra,* one-half of those funds represented her money, and hence that the case comes within the rules laid down in Article 25 of Regulations 70, *infra,* we submit that Article 25 goes beyond the statute and is invalid.

The language of the statute requires the proceeds to be included when the policies are "taken out by the decedent." The words "taken out by" have no fixed meaning. To the layman they would mean that he applied for the policy, or acquired it by purchase (see *Igleheart* v. *Commissioner,* 77 F. (2d) 704 (C. C. A. 5th)); that he chose the beneficiary; and that the policy had been delivered to him. We think that it would never occur to him that the insurance had only partly been taken out by him because in some year or years when he had reverses he called upon his wife to pay the premiums or she voluntarily did so, or because in normal years the premiums were paid out of community funds. Much less would it occur to him that this would be true with respect to policies which were issued before his marriage. Three of the policies involved in this case were of that character.

In *Royal Arcanum* v. *Behrend,* 247 U. S. 394, this Court held that the fact that the beneficiary had paid an assessment on a benefit certificate did not deprive the decedent of his right to change the beneficiary. We do not think that a different rule applies to regular life insurance where the right to change the beneficiary is reserved. Hence it cannot be said that the wife who pays a part of the premiums purchases an interest in the proceeds. In reality she makes a gift where she has no assur-

ance of retaining her interest as beneficiary.[3] In providing that the proceeds of policies payable to specific beneficiaries should be taxed to the extent that they exceed the very liberal exemption of $40,000, Congress undoubtedly intended to exercise its constitutional power to tax such proceeds to the fullest extent possible. See the House Report quoted pp. 13–14, *supra*. Compare *Irwin* v. *Gavit,* 268 U. S. 161. That intention would seem to require the inclusion of the proceeds of policies on the decedent's life where he retains the right to change the beneficiary or other incidents of ownership irrespective of who pays the premiums. *Chase Nat. Bank* v. *United States, supra,* does not hold that the decedent must pay the premiums in order for the proceeds to be taxed, although it does suggest that the fact that he has paid them may be an element which justifies the imposition of the tax. It would seem to be sufficient if he has paid the premiums, *or* if another (not the beneficiary) has paid them, *or* if he has retained incidents of ownership. This is the test laid down by Article 25 of Regulations 80. In *United States* v. *Supplee-Biddle Co.,* 265 U. S. 189, this Court stated, as a ground of decision upon a different issue, that the proceeds of an insurance policy on the life of a corporate officer of which the corporation was beneficiary and on which it paid the premiums were to be included in the gross estate under Section 402 (f) of the Revenue Act of

[3] See Clark, "Inheritance and Estate Taxes on Life Insurance", pp. 46–48.

1918. The provision in the Act of 1918 is identical with that of Section 302 (g) of the Revenue Act of 1926.

In so far as Article 25 of Regulations 70 provides for the exclusion of all or a part of the proceeds where the beneficiary has paid all or a part of the premiums, we submit that it unduly restricts the statute and encourages tax avoidance. If a married man may avoid an estate tax on the proceeds of insurance policies payable to his wife or children by the simple expedient of permitting them, or a trustee for them, to pay the premiums (*Helvering* v. *Reybine, supra*), he may easily provide them with funds for that purpose and a large part of the effectiveness of the statute will be lost.

We recognize the rule of construction that requires great weight to be given to a Treasury regulation which has continued in effect after there has been a reenactment of another statute similar to that construed by the regulation (*Brewster* v. *Gage*, 280 U. S. 327; *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269; *Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S. 289; *Walker* v. *United States, supra*); but we do not think that that rule of construction can serve to perpetuate a regulation which unduly restricts the statute and is inconsistent with it. In *Manhattan Co.* v. *Commissioner*, 297 U. S. 129, rehearing denied, 297 U. S. 728, this Court said (pp. 134–135):

> The power of an administrative officer or board to administer a federal statute and to

> prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. *Lynch* v. *Tilden Produce Co.,* 265 U. S. 315, 320–322; *Miller* v. *United States,* 294 U. S. 435, 439–440, and cases cited. And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable. *International Ry. Co.* v. *Davidson,* 257 U. S. 506, 514. The original regulation, as applied to a situation like that under review, is both inconsistent with the statute and unreasonable.

The reasoning of the Court is applicable to this case. The view of the court in *Walker* v. *United States, supra,* that the Commissioner could not change Article 25 of Regulations 70 and that it must control seems fundamentally unsound if, as we believe, that regulation was not in accord with the statute.

We submit that the correct rule to be applied is found in Article 25 of Regulations 80 (1937 Ed.), which provides that the proceeds of the policies are to be considered as having been "taken out" by the decedent, if the decedent possesses any of the legal incidents of ownership in the policy. Applying those principles to the instant case, the proceeds of

the policies which are payable to the wife are not to be excluded from the gross estate merely because the premiums were paid from community funds. They are to be included if the decedent retained any of the legal incidents of ownership.

II

THE DECEDENT RETAINED INCIDENTS OF OWNERSHIP SUFFICIENT TO WARRANT THE INCLUSION IN HIS GROSS ESTATE OF THE PROCEEDS OF THE POLICIES, NOTWITHSTANDING THE FACT THAT THE PREMIUMS WERE PAID WITH COMMUNITY FUNDS

Under the principles just discussed the total proceeds of the policies must be included in the decedent's gross estate if he retained incidents of ownership and control until the date of his death. See also *Chase Nat. Bank* v. *United States,* 278 U. S. 327; *Bingham* v. *United,* 296 U. S. 211; *Industrial Trust Co.* v. *United States,* 296 U. S. 220. The issue to be determined here is whether the fact that the premiums were paid from community funds so deprived the decedent husband of the incidents of ownership and control of the policies on his life that a part of the proceeds proportionate to one-half of the premiums paid with the community funds should be excluded from his gross estate.

It is clear that with respect to the policies issued prior to the decedent's marriage in 1905 and those issued subsequently, up to the date of the passage

of the Revenue Act of 1918, the decedent retained the right to change the beneficiaries; for otherwise it would not be conceded in the certificate that any part of the proceeds were taxable. It is well settled that the proceeds of policies payable to named beneficiaries taken out prior to the passage of the Revenue Act of 1918 may not be included in the gross estate unless that right is reserved. *Bingham* v. *United States, supra; Industrial Trust Co.* v. *United States, supra; McKelvy* v. *Commissioner,* 82 F. (2d) 395 (C. C. A. 3rd); *Levy's Estate* v. *Commissioner,* 65 F. (2d) 412 (C. C. A. 2nd); *Pennsylvania Co. for Insurance* v. *Commissioner,* 79 F. (2d) 295 (C. C. A. 3rd), certiorari denied, 296 U. S. 651; *Helvering* v. *Parker,* 84 F. (2d) 838 (C. C. A. 8th). See also *Commissioner* v. *Sharp,* 91 F. (2d) 804 (C. C. A. 3rd), affirmed, on other grounds, March 14, 1938, No. 558, present Term; *Helburn* v. *Ballard,* 85 F. (2d) 613 (C. C. A. 8th). The certificate merely inquires whether a part of the proceeds proportionate to the wife's interest in the community funds used to pay the premiums is to be excluded.

Similarly, with respect to the policies issued after the passage of the Revenue Act of 1918, it may properly be assumed that the decedent reserved the right to change the beneficiary or such other incidents of ownership as were deemed sufficient under the decision of this Court in *Chase Nat. Bank* v. *United States, supra,* to make the proceeds of an insurance policy taxable. Other-

wise, the certificate would not concede that any portion of the proceeds should be included in the gross estate.

Accordingly, with respect to both groups of policies the issue is to what extent the husband's incidents of ownership and control are restricted by his use of the community funds to pay the premiums.

In the *Chase Nat. Bank* case this Court defined the incidents of ownership and control which justified the imposition of an estate tax upon the proceeds of insurance policies which were payable to beneficiaries other than the estate. The Court there said (pp. 334–335):

> It is true, as emphasized by plaintiffs, that the interest of the beneficiaries in the insurance policies effected by decedent "vested" in them before his death and that the proceeds of the policies came to the beneficiaries not directly from the decedent but from the insurer. But until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them. The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, as is true of the termination by death of

> any of the other legal incidents of property through which its use or economic enjoyment may be controlled.
>
> A power in the decedent to surrender and cancel the policies, to pledge them as security for loans, and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors, *Cohen* v. *Samuels,* 245 U. S. 50 (see *Burlingham* v. *Crouse,* 228 U. S. 459), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts, N. Y. *Domestic Relations Law,* c. 14, Consol. Laws § 52; *Kittel* v. *Domeyer,* 175 N. Y. 205; *Guardian Trust Co.* v. *Straus,* 139 App. Div. 884, aff'd 201 N. Y. 546, is by no means the least substantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death.

The applications for the policies in this case were made by the husband and the contract was between him and the insurance company. He alone chose the beneficiaries of the policies; and the contracts gave him alone the power to change them. The wife was not a party to the contracts and had no interest in them apart from whatever interest she acquired as a beneficiary under those made payable to her and from whatever interest she had by virtue

of the husband's use of the community funds to pay the premiums. Hence the query in this case is as to whether under the Washington community property law and decisions the fact that he did use community funds in paying the premiums and that his wife was the beneficiary under some of the policies operated to deprive him of the right which he otherwise would have had to change the beneficiary, to surrender and cancel the policies, to pledge them for loans, or to dispose of them and their proceeds for his own benefit during his lifetime. The fact that policies paid for with community funds may be termed "community assets" in the Washington decisions (see *Occidental Life Ins. Co.* v. *Powers,* 74 Pac. (2d) 27) furnishes no solution to this problem. It is necessary to ascertain what rights the husband retains in respect of such assets.

Under the Washington community property law the husband is given the complete and exclusive right to manage, control, and dispose of community personal property, with the qualification that he cannot devise by will more than one-half of such property. Section 6892, Remington's Revised Statutes of Washington, Appendix B, *infra,* p. 52. The test as to whether his contracts relating to community personal property bind the community is whether they were made, in the course of his management, for the benefit of the community, and not whether they were of actual benefit to the community. *Way* v. *Lyric Theater Co.,* 79 Wash. 275; *Catlin* v. *Mills,* 140 Wash. 1; *Henning* v. *Ander-*

son, 121 Wash. 53; *American Surety Co.* v. *Sandberg*, 244 Fed. 701 (C. C. A. 9th); *O'Malley & Co.* v. *Lewis*, 176 Wash. 194. He is not required to account to his wife, as an agent is required to account to his principal (*Poe* v. *Seaborn*, 282 U. S. 101; *Daniel* v. *Daniel*, 106 Wash. 659). The statute does not even provide that he shall not give away community property without his wife's consent, although in specific instances the courts have set aside such gifts. *Parker* v. *Parker*, 121 Wash. 24; *Marston* v. *Rue*, 92 Wash. 129; *Schramm* v. *Steele*, 97 Wash. 309; *In re McCoy's Estate*, 189 Wash. 103. See also *Poe* v. *Seaborn*, *supra*. In most of the more recent Washington cases the court has said that the husband cannot give away a *substantial* amount of community property. See *Parker* v. *Parker*, *supra*; *Nimey* v. *Nimey*, 182 Wash. 194. In any case, the burden of proof is upon the wife when she seeks to interfere. *Gould* v. *Culver*, 148 Wash. 689; *Marston* v. *Rue*, *supra*.

There are few Washington decisions dealing with the question whether the wife may claim part of the proceeds of insurance policies the premiums on which have been paid with community funds. We have found none holding that she may claim an interest in policies which were originally made payable to the decedent's children or other beneficiaries, with the right reserved to change them; and the taxpayer has cited none. In all the decided cases the wife was named as beneficiary and

the husband changed the beneficiary without her knowledge.

In *Cade* v. *Head Camp, W. O. W.*, 27 Wash. 218 (decided in 1902), it was held that a wife could not recover on a beneficial certificate of a fraternal organization originally made payable to her where the assessments had been paid from community funds and her husband had taken out a new certificate payable to his father and mother without her knowledge and consent. The court there held that the fact that the assessments had been paid from community funds did not deprive him of his right to change the beneficiary and that he would have had the same right to do so had they been paid with her separate funds.

But in *Occidental Life Ins. Co.* v. *Powers, supra*, the court refused to follow the *Cade* case and the wife was allowed to recover the total proceeds of an insurance policy on her husband's life where she had been the original beneficiary and the premiums had been paid with community funds, even though the policy gave the decedent the right to change the beneficiary, and he had substituted his mother and an employee as beneficiaries. The basis of the decision appears to be that the change was made without the knowledge and consent of the wife and that any gift of the community funds without the knowledge and consent of the wife was invalid. But the decision in that case was a five to four decision and Judge Beals pointed out in his dissent that it had never been the rule in Wash-

ington that the husband could not make any gift whatever of the community funds, but merely that he could not give away substantial sums so as to defraud his wife. See *Parker* v. *Parker, supra; Nimey* v. *Nimey, supra; Marston* v. *Rue, supra.* Judge Beals considered also that the payment should be deemed to be for the benefit of the community, for the reason that it was against public policy to hold that a married man could make no provision for his relatives and dependents unless the wife should consent to his use of the community funds for that purpose. Finally, it was pointed out that if there was any gift, it was a gift of the premiums paid from community funds, and not a gift of the proceeds of the policies, and that the majority opinion had erroneously allowed the wife to recover the total proceeds.

In *Shields* v. *Barton,* 60 F. (2d) 351, the Circuit Court of Appeals for the Seventh Circuit had before it a case in which a surviving husband claimed part of the proceeds of an insurance policy on his wife's life which was made payable to his wife's sister. The policy had been taken out before marriage and part of the premiums had been paid with separate funds and part with community funds. The court there held that the husband could recover a proportionate part of the proceeds, but in doing so it relied upon California decisions and not upon Washington decisions.

In view of the fact that the *Cade* and the *Occidental Life Ins. Co.* cases are the only Washington

cases dealing with the question whether the wife can recover any part of the proceeds of an insurance policy on her husband's life when the premiums are paid with community funds, and that both of those cases dealt with policies made payable to the wife, we submit that it cannot be assumed that under the Washington law the wife in this case would have been able to recover any part of the proceeds of the policies made payable to the decedent's children. We see no reason to doubt that the decedent retained until his death the same right to change the beneficiaries of those policies, to cancel or surrender them, and to borrow on them, that he would have had if the premiums were paid with his separate funds.

It is no answer to suggest that the presumption of local law is that he took out the policies as agent for the community. Section 302 (g) of the Revenue Act of 1926, *infra,* provides that the proceeds of insurance policies are to be included in the gross estate where the policies were "taken out by the decedent." The words "taken out by" do not require that a presumption of local law should control this issue. In *Poe* v. *Seaborn, supra,* it was held that where a Federal statute imposed a tax upon the net income "of every individual," the word "of" denoted ownership, and hence that the local law controlled. The words "taken out by" carry no such implication. *Burnet* v. *Harmel,* 287 U. S. 103. The statute in substance requires that the proceeds are to be included unless there is proof

that the policies were not taken out by the decedent. A presumption under the local law that they are taken out by the community is not the proof required. See *Robinson* v. *Commissioner,* 63 F. (2d) 652 (C. C. A. 6th), certiorari denied, 289 U. S. 758.

The provisions of the Federal taxing statutes may not be vitiated by means of a state statute prescribing a mode of proof inconsistent with that required by the Federal revenue laws. *Burk-Waggoner Assn.* v. *Hopkins,* 269 U. S. 110; *Weiss* v. *Wiener,* 279 U. S. 333, 337; *California Iron Yards Co.* v. *Commissioner,* 47 F. (2d) 514 (C. C. A. 9th); *Robinson* v. *Commissioner, supra;* see, also, *New Orleans & N. E. R. Co.* v. *Harris,* 247 U. S. 367. *Robinson* v. *Commissioner, supra,* involved Section 302 (e) of the Revenue Act of 1924, which required that there be included in the gross estate the entire amount of joint bank deposits "except such part thereof as may be shown to have originally belonged" to the survivor. It was argued that under the laws of Michigan there was a presumption of equal ownership of the deposits and that in the absence of any other proof this presumption must prevail. The court rejected the argument.

We concede that it is proper to consult the state law to determine what incidents of ownership were retained by the decedent, but we submit that the Court is not required to give effect to presumptions and fictions of Washington law which have no real substance. The Federal taxing statutes do not deal with the community as an entity (*Poe* v. *Seaborn,*

supra) but follow the local view that the community funds are owned by the husband and wife equally. Hence the most that can be said is that the decedent used some of his wife's money to pay the premiums on these policies. He applied for the insurance and chose the beneficiaries—and the Washington decisions do not show that he did not have all of the incidents of ownership of the policies that he would have had if he had used his own funds. The court below in the case of *Bank of America Nat. T. & Sav. Ass'n* v. *Commissioner, supra,* held that the total proceeds of policies on the husband's life which were payable to beneficiaries whose identity was not disclosed should be included in the gross estate, notwithstanding the fact that the premiums were paid with community funds—and in so holding, stated that the local law did not control. We believe that the right result was reached in that case and that it cannot be distinguished from the case at bar by reason of the fact that there it was stipulated that the policies were taken out by the decedent. That was a stipulation on an issue of law which was not binding on the parties. *Swift & Co.* v. *Hocking Valley Ry. Co.,* 243 U. S. 281.

We consider now the policies payable to the decedent's wife. The *Bank of America* case did not deal with such policies, and the court did not consider the effect of the decision in the *Occidental Life Ins. Co.* case. For reasons given in the dissenting opinion in the latter case, to which we have pre-

viously referred (pp. 33–34, *supra*), we do not believe that the decision in that case is a sound application of Washington law. But even if it must be accepted as stating the law of Washington, the wife in this case could only have recovered the proceeds of the policies made payable to her, if the decedent had changed the beneficiary without consideration (see pp. 41–42, *infra*) and without her knowledge and consent, and if she had asserted a claim to them. This means that the change of beneficiary in such a case would be effective so long as the wife did not assert a claim; in other words, that the decedent had power even without consideration to give at least a defeasible interest in the policy to someone else.

In the court below counsel for the taxpayer relied upon the decisions of California. We do not believe that those decisions are pertinent. Under Section 172 of Deering's Civil Code of California, as amended in 1917, it is specifically provided that the husband cannot make any gift of the community personal property or dispose of it without a valuable consideration. There is no statutory provision to that effect in Washington. Even under the California decisions, however, the named beneficiary acquires an interest in the policy, subject only to its being defeated if the wife asserts a timely claim—and this despite the fact that in California since 1927 the wife, as in Washington, has by statute a vested half interest in community property. (See Sec. 161 (a), Deering's Civil Code

of California, 1931.) *Blethen* v. *Pacific Mut. Life Ins. Co.*, 198 Cal. 91;[4] *Union Mut. Life Ins. Co.* v. *Broderick*, 196 Cal. 497; *Dixon Lumber Co.* v. *Peacock*, 217 Cal. 415; *Mazman* v. *Brown*, 12 Cal. App. (2d) 272; *Martinez* v. *Hudson*, 14 Cal. App. (2d) 42; *Travelers Ins. Co.* v. *Fancher*, 219 Cal. 351. All but the first two of these cases involved premiums paid after the amendment of the California Community Property Law in 1927. These decisions establish that in California the wife's interest in a policy, the premiums on which are paid out of community funds, is not a vested or absolute interest.[5]

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[4] In this case the court said (pp. 101–102):

"The rule that the gift of a husband of community property is valid until avoided by the wife, applicable to community property in general, is applicable to the proceeds of an insurance policy, the premiums on which have been paid out of community funds.

"It follows that a gift by a husband of an insurance policy to a beneficiary, other than his wife, is a good and valid gift until avoided by the wife by an assertion of her right to one-half of the proceeds, and the insurance company, until it has been made aware of the wife's claim, is justified in delivering to the beneficiary, as the person rightfully entitled thereto, the proceeds of the policy upon the death of the insured husband. The insurance company having contracted with the husband, and having promised to pay the proceeds of the policy to whomsoever he designated, in the absence of notice of any adverse claim, could do nothing but fulfill its contract. In short, until the wife has given notice of her claim to one-half of the proceeds, thereby asserting her statutory right of avoiding the gift *ab initio* (*Dargie* v. *Patterson*, *supra*), all of the parties to the contract of insurance were entitled to deal with the subject matter thereof as if the gift were absolute."

[5] So far as any statements of the court in *New York Life Ins. Co.* v. *Bank of Italy*, 60 Cal. App. 602, cited in the

The named beneficiary under the policy may collect the proceeds unless the wife asserts her interest before they are paid. It should be noted also that in all of the cases the insurance was made payable to another without the wife's knowledge until after her husband's death. If she had known that her husband had named a beneficiary other than herself, she undoubtedly would have been precluded from asserting a claim to the proceeds after his death. See *Blethen* v. *Pacific Mut. Life Ins. Co.*, *supra.*

We do not believe that the California decisions are pertinent to this case. We refer to them because they were relied upon by the taxpayer in the court below, and have been cited by *amicus curiae*, as indicating that the wife has an absolute right to the proceeds of policies paid with community funds. We do not think that they go so far. Moreover, we again emphasize that in California there is a specific provision against the husband's giving away any community property, whereas there is no such provision in the Washington statute, and most of the decisions hold merely that he may not give away a substantial amount of such property. *Parker* v. *Parker; Nimey* v. *Nimey*, both *supra.* We question whether a married man who, each year, uses a few hundred or even a few

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brief of the *amicus curiae*, p. 6, may indicate the contrary, they must be taken to have been qualified by the later decisions of the Supreme Court of California, cited above.

thousand dollars from large community funds to pay premiums on life insurance policies made payable to a beneficiary other than his wife can be said to have given away a substantial part of the funds.

It has been held under the Washington decisions that the wife, as beneficiary, acquires no vested interest in policies which are made payable to her subject to the right of the husband to change the beneficiary. *Schade* v. *Western Union Life Ins. Co.*, 125 Wash. 200; *Seattle Ass'n of Credit Men* v. *Bank of Cal.*, 177 Wash. 130; *Toole* v. *National Life Insurance Co.*, 169 Wash. 627; *Johnston* v. *Johnston*, 182 Wash. 573; *Massachusetts Mutual Life Ins. Co.* v. *Bank of California*, 187 Wash. 565. In most of those cases it does not appear whether the premiums were paid with community funds. But in the *Johnston* case part of them were so paid, and it was nevertheless held that the wife did not have a vested interest. Because she does not have a vested interest in such a policy the cases hold that the husband may, for a consideration, assign the policy or change the beneficiary, even though the policy was made payable to the wife. *Schade* v. *Western Union Life Ins. Co., supra; Johnston* v. *Johnston, supra; Seattle Ass'n of Credit Men* v. *Bank of Cal., supra.* In the *Johnston* case the policy had been made payable to the wife, with the right to change the beneficiary reserved, and the first premium had been paid with community funds.

The husband changed the beneficiary to his father, who had supported him during an illness. Upon his death the wife brought an action against his father and mother and against the insurance company to recover the proceeds. The court held that the change in beneficiary was not made as a gift but for a consideration and that the wife was not entitled to recover.

These decisions indicate that the husband in this case was free to assign the policies or change the beneficiaries for a consideration, without his wife's consent. It may be argued that he could have done so only for a consideration flowing to the community, but such an argument loses sight of the fact that the husband's purposes and the community's purposes are practically identical. In the *Johnson* case the consideration for the decedent's change of the beneficiary from the wife to his father was support and care for himself. Undoubtedly a husband's assignment of the policy to pay a tailor's bill or personal traveling expenses would similarly be termed an assignment for community purposes under the Washington law. But this is a mere fiction. It is clear that such an assignment or a change of beneficiary for such a consideration would serve to satisfy the personal needs and desires of the husband alone. Yet for such a purpose the husband can deprive the wife of her right to receive the proceeds of the policies.

We submit, therefore, that the husband retained sufficient incidents of ownership in the policies made payable to his wife to render them subject to Federal estate tax, notwithstanding the fact that the premiums were paid in whole or in part from community funds. His right to change the beneficiary, to assign the policy, or to borrow on it for purposes which would benefit him personally, are substantial incidents of ownership and bring the proceeds of the insurance policies within Section 302 (g), *infra*, under the rules laid down by this Court in *Chase Nat. Bank* v. *United States, supra*. In this connection, it is not without significance that the Washington inheritance tax law now provides that the proceeds of insurance policies payable on the death of any person shall be taxed, "irrespective of the fact that the premiums of the policy have been paid by some person, partnership or corporation other than the insured." Section 115, Laws of Washington, 1935, c. 180, p. 784 (Appendix B, *infra*, pp. 52–55). See also *In re McGrath's Estate*, 71 Pac. 395 (Wash.).

CONCLUSION

We submit that the first alternative to the first question certified should be answered "Yes", and the second alternative "No"; that the second question should be answered "Yes"; that the fourth

and fifth questions should be answered "No"; and that the third question requires no answer.

Respectfully submitted.

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APRIL 1938.

APPENDIX A

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 301. (a) In lieu of the tax imposed by Title III of the Revenue Act of 1924, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this act, whether a resident or nonresident of the United States;

* * * * *

(U. S. C., Title 26, Secs. 410, 460.)

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

(U. S. C., Title 26, Sec. 411.)

Treasury Regulations 70 (1929 Edition), promulgated under the Revenue Act of 1926:

> ART. 25. *Taxable insurance.*—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.
>
> The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is deemed to be taken out by the decedent in all cases where he pays all the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance is not deemed to be taken out by the decedent, even though the application is made by him, where all the premiums are actually paid by the beneficiary. Where a portion of the premiums were paid by the beneficiary and the remaining portion by the decedent the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total of premiums paid.
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> ART. 27. *Insurance receivable by other beneficiaries.*—All insurance in excess of $40,000 receivable by beneficiaries other than the estate, regardless of when taken out, must be included in the gross estate where the decedent during his life retained legal incidents of ownership in the policies of insurance, as, for example, a power to change the beneficiary, to surrender or cancel the policies, to assign them, to revoke an assignment of them, to pledge them for loans, or

to dispose otherwise of them and their proceeds for his own benefit, etc.

However, irrespective of the retention of such legal incidents of ownership, all insurance in excess of $40,000 receivable by beneficiaries other than the estate must be included in the gross estate (1) of any decedent dying after the enactment of the Revenue Act of 1924, where such insurance was taken out, or the beneficiary receiving the proceeds was named, after the enactment of the Revenue Act of 1918, and (2) of any decedent dying after the passage of the Revenue Act of 1918, but before the effective date of Title III of the Revenue Act of 1924, where such insurance was taken taken out, or the beneficiary receiving the proceeds was named, after the enactment of the particular revenue act in force and effect at the time of such a decedent's death.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

ART. 28. *Valuation of insurance.*—The amount to be returned where the policy is payable to or for the benefit of the estate is the amount receivable. Where the proceeds of a policy are payable to a beneficiary other than to or for the benefit of the estate, and all the premiums were paid by the

> decedent, the amount to be listed on Schedule C of the return is the full amount receivable, but where the proceeds are so payable and only a portion of the premiums were paid by the decedent, the amount to be listed on such schedule is that proportion of the insurance receivable which the premiums paid by the decedent bear to the total premiums paid.* * *

Treasury Regulations 80 (1934 Ed), promulgated under the Revenue Acts of 1926 and 1932, as amended:

> ART. 25. *Taxable insurance.*—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.
>
> The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is considered to be taken out by the decedent in all cases, whether or not he makes the application, if he pays the premiums either directly or indirectly, or they are paid by a person other than the beneficiary, or decedent possesses any of the legal incidents of ownership in the policy. Legal incidents of ownership in the policy include, for example: The right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The decedent possesses a legal incident of owner-

ship if the rights of the beneficiaries to receive the proceeds are conditioned upon the the beneficiaries surviving the decedent.

ART. 27. *Insurance receivable by other beneficiaries.*—The statute requires the inclusion in the gross estate of the decedent of the proceeds of any policy, or the aggregate proceeds of all policies, not receivable by or for the benefit of decedent's estate, to the extent that such proceeds exceed $40,000, regardless of when the policy was or the policies were issued, if the decedent possessed at the time of his death any of the legal incidents of ownership.

The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total, $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word "beneficiaries," as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money.

ART. 28. *Valuation of insurance.*—The amount to be returned if the policy is payable to or for the benefit of the estate is the amount receivable. If the proceeds of a policy are payable to a beneficiary other than to or for the benefit of the estate, the amount to be listed on Schedule C of the return is the full amount receivable. (For taxable portion, see article 27.) * * *

APPENDIX B

Remington's Revised Statutes of Washington, Annotated (1932 Edition):

Volume 3:

SEC. 1342. *Descent of community property.*—Upon the death of either husband or wife, one-half of the community property shall go to the survivor, subject to the community debts, and the other half shall be subject to the testamentary disposition of the deceased husband or wife, subject also to the community debts. In case no testamentary disposition shall have been made by the deceased husband or wife or his or her half of the community property, it shall descend equally to the legitimate issue of his, her or their bodies. If there be no issue of said deceased living, or none of their representatives living, then the said community property shall all pass to the survivors to the exclusion of collateral heirs, subject to the community debts, the family allowance, and the charges and expenses of administration.

SEC. 1370. *Community interests.*—This act shall apply to community real property and also to separate estate; and upon the death of either husband or wife, title of all community real property shall vest immediately in the person or persons to whom the same shall go, pass, descend or be devised, as provided in section 1342, subject to all the charges mentioned in section 1366 of this act.

SEC. 1419. *Community property, how administered.*—A surviving spouse shall be en-

titled to administer upon the community property, notwithstanding any provisions of the will to the contrary, if the court find such spouse to be otherwise qualified; but if such surviving spouse do not make application for such appointment within forty days immediately following the death of the deceased spouse, he or she shall be considered as having waived his or her right to administer upon such community property. If any person, other than the surviving spouse, make application for letters testamentary on such property, prior to the expiration of such forty days, then the court, before making any such appointment, shall require notice of such application to be given the said surviving spouse, for such time and in such manner as the court may determine, unless such applicant show to the satisfaction of the court that there is no surviving spouse or that he or she has in writing waived the right to administer upon such community property.

Volume 8:

SEC. 6890. *Separate property of husband.*—Property and pecuniary rights owned by the husband before marriage, and that acquired by him afterward by gift, bequest, devise or descent, with the rents, issues, and profits thereof, shall not be subject to the debts or contracts of his wife, and he may manage, lease, sell, convey, encumber, or devise, by will, such property without the wife joining in such management, alienation, or encumbrance, as fully and to the same effect as though he were unmarried.

SEC. 6891. *Separate property of wife.*—The property and pecuniary rights of every married woman at the time of her marriage, or afterward acquired by gift, devise, or inheritance, with the rents, issues, and profits

thereof, shall not be subject to the debts or contracts of her husband, and she may manage, lease, sell, convey, encumber or devise by will such property to the same extent and in the same manner that her husband can, property belonging to him.

SEC. 6892. *Community property defined—Husband's control of personalty.*—Property, not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property. The husband shall have the management and control of community personal property, with a like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof.

SEC. 6893. *Community realty, conveyance of, etc.*—The husband has the management and control of the community real property, but he shall not sell, convey, or encumber the community real estate, unless the wife join with him in executing the deed or other instrument of conveyance by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument of conveyance must be acknowledged by him and his wife: *Provided, however,* that all such community real estate shall be subject to the liens of mechanics and others for labor and materials furnished in erecting structures and improvements thereon as provided by law in other cases, to liens of judgments recovered for community debts, and to sale on execution issued thereon.

Laws of Washington (1935), c. 180:

Revenue Act of 1935:

SEC. 115. Insurance payable upon the death of any person shall be deemed a part of the estate for the purpose of computing

the inheritance tax and shall be taxable to the person, partnership or corporation entitled thereto. Such insurance shall be taxable irrespective of the fact that the premiums of the policy have been paid by some person, partnership or corporation other than the insured, or paid out of the income accruing from principal provided by the assured for such payment, whether such principal was donated in trust or otherwise: *Provided, however,* That there is exempt from the total amount of insurance, regardless of the number of policies, the sum of forty thousand dollars and no more: *Provided, however,* That in the case of insurance upon the life of a decedent officer or employee of a corporation, payable to the corporation, or upon the life of a decedent, employee of or partner in a business enterprise, payable to one or more of the partners, where all the premiums upon such policy have been paid exclusively by such beneficiary, upon the death of the decedent the amount only of the proceeds of the policy in excess of the cash surrender value immediately preceding the death of the decedent shall be deemed a part of the estate for the purpose of computing the inheritance tax, and taxed as provided in class A, section 106 of this title.

Where more than one beneficiary is entitled to the benefit of the provisions of this section exempting forty thousand dollars of the proceeds of insurance policies, payable upon death, the benefit of such exemption shall be apportioned among such beneficiaries ratably and proportionately: *Provided,* That where there is fraternal benefit society insurance payable upon the death of the decedent and other insurance payable upon the death of the decedent, the forty thousand

dollars exemption shall first be taken from the fraternal benefit society insurance, and, if the same does not equal forty thousand dollars, then the balance of the forty thousand shall be prorated among other policies.

The inheritance tax upon the proceeds of any insurance policy shall be a lien upon the proceeds of such policy in the hands or possession of the estate of the deceased insured or in the hands or possession of any other beneficiary under such policy to whom such proceeds may have been paid: *Provided,* That when proceeds of insurance payable upon death, or receivable by a beneficiary other than the executor or representative, the executor or representative shall recover from such beneficiary the tax due upon such proceeds of such policy or policies. The supervisor shall have power to release such lien with respect to all or any part of such proceeds if he be satisfied that the collection of the tax will not thereby be jeopardized.

Nothing in this act shall prevent the payment by any insurance company, association or society of the proceeds of any policy upon the death of a decedent to the person entitled thereto, but every insurance company, association or society, whether authorized to transact business within this state or not, having a policy or policies of insurance or death benefit or certificate or certificates in an aggregate amount of one thousand dollars or more payable upon the death of a decedent, a resident of this state, shall give a written notice of the death of the decedent and the amount of the policies issued and the names of the beneficiaries to the supervisor in such form as the supervisor may prescribe, within three days after receiving notice of the death of such decedent. Any

insurance company, association or society failing, neglecting or refusing to give such notice to the supervisor as above provided shall be personally liable for the payment of the inheritance tax herein provided.

U. S. GOVERNMENT PRINTING OFFICE: 1938

FILE COPY

IN THE

Supreme Court
OF THE
United States.

October Term, 1937.

No. 919

Estate of Julius C. Lang, Deceased, and Richard E. Lang, Executor, and Grace E. Lang, Executrix of the Estate of Julius C. Lang, Deceased,

vs.

Commissioner of Internal Revenue.

BRIEF AS AMICUS CURIAE.

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SUBJECT INDEX.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1937.

No.................

ESTATE OF JULIUS C. LANG, DECEASED, and RICHARD E. LANG, EXECUTOR, and GRACE E. LANG, EXECUTRIX OF THE ESTATE OF JULIUS C. LANG, DECEASED,

vs.

COMMISSIONER OF INTERNAL REVUNUE.

BRIEF AS AMICUS CURIAE.

Statement.

By permission of the Court, upon the consent of counsel for the respective parties, this brief is filed as *amicus curiae* on behalf of Vee Wolf Roberts as administratrix of the estate of Stephen R. Roberts, deceased.

Jurisdiction.

This cause was brought up to this Honorable Court by certificate to the Supreme Court of the United States of questions at law upon which the certificate of the Court of Appeals for the Ninth Circuit desires instructions for the proper decision of a cause therein pending.

Questions Presented.

In this brief as *amicus curiae* the undersigned will discuss only questions 1 and 4, certified to this Honorable Court as aforesaid.

The question presented by questions 1 and 4 of said certificate is as follows:

Where policies of life insurance written upon the life of a decedent at all times domiciled in the state of Washington, which policies were applied for after the marriage of the decedent, the proceeds of which were payable to his wife and the premiums on which were paid entirely with community funds of said decedent and his wife, are the full amounts or only one-half of the proceeds of such policies (less permissible exemptions) to be included in the husband's gross estate subject to the federal estate tax?

Statutes and Regulations Involved.

The section of the Revenue Act involved is Section 302 (g), of the Revenue Act of 1926.

The regulations of the Commissioner of Internal Revenue involved are Articles 25 and 28 of Regulations 70, and Articles 25 and 27 of Regulations 80, as amended by T. D. 4729, approved March 18, 1937.

That Section 302 (g) aforesaid, and the regulations involved are printed in Appendix A, pages 25 to 28, inclusive.

Statement of Facts.

For a complete statement of the facts here involved see certificate to the Supreme Court of the United States of questions of law upon which the Circuit Court of Appeals for the Ninth Circuit desires instructions for the proper decision of the cause.

Summary of Argument.

Argument of *amicus curiae* will be divided into three major subdivisions:

A. The law of the state of Washington gives the wife an equal and existing interest in the community funds.

B. Section 302 (g) of the Revenue Act of 1926 requires the inclusion (less permissible exemptions) in the gross estate of the husband of only one-half of the proceeds of insurance paid with community funds, this being the extent of the husband's interest in and to said insurance.

C. Should this Court deem the applicable regulation to be Articles 25 and 27 of Regulations 80, nevertheless, it is the contention of *amicus curiae* that only one-half of the proceeds of the life insurance policies must be included in the gross estate of the decedent.

ARGUMENT.

I.

There should be included in decedent's gross estate only one-half of the full amount of the insurance proceeds which were purchased out of community funds of spouses domiciled in the state of Washington since the inception of their marriage.

A. The law of the state of Washington gives the wife an equal and existing interest in the community funds.

This Honorable Court has previously had occasion to pass upon the community property laws of the state of Washington and the respective interests of the spouses therein. In *Poe v. Seaborn,* 282 U. S. 101, 51 Sup. Ct. 58, 75 L. Ed. 239 (1930), this Court stated:

> "We are of the opinion that under the law of Washington the entire property and income of the community can no more be said to be that of the husband than it could rightfully be termed that of the wife." (282 U. S. 101, 113.)

The wife's right in the community property under the laws of the state of Washington is an absolute and vested one, equal in all respects to that of her husband.

> *Schramm v. Steele,* 97 Wash. 309, 166 Pac. 634;
> *Poe v. Seaborn, supra;*

and with respect to the community property the husband is merely a statutory agency created for the convenience of the community, and this statutory agency does not in

any wise differentiate the property interests of the husband in the community estate from that of the wife.

> *Warburton v. White,* 176 U. S. 494, 20 Sup. Ct. 404, 44 L. Ed. 555;
>
> *Poe v. Seaborn, supra;*
>
> 32 *Op. A. G.*, at 458;
>
> *Occidental Life Insurance Co. v. Powers et al.,* ....Wash............., 74 Pac. (2d) 27 (1937);

nor does the husband have a right either of property or agency entitling him to alienate the interest of the wife in community property.

> *Poe v. Seaborn, supra;*
>
> *Schramm v. Steele, supra;*[1]
>
> *Occidental Life Ins. Co. v. Powers et al., supra.*

The Supreme Court of Washington has determined that the proceeds of insurance policies purchased out of community property were the community property of the hus-

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[1]The Supreme Court of Washington, in *Schramm v. Steele, supra,* said:

> "The husband is made, by the statute, the manager, not the owner. His management and control include the power of absolute disposition, but only for the community.
>
> "* * * These considerations make it plain that the statute, in conferring upon the husband the management and control of the community property, though giving him the absolute power of disposition of community personalty, intends no more than to make him the statutory agent of the community."

band and wife in the same manner as investment in any other type of property.

> *Occidental Life Insurance Co. v. Powers et al., supra;*
>
> *Shields v. Barton,* 60 Fed. (2d) 351 (C. C. A. 7th, 1932);
>
> *New York Life Insurance Co. v. Bank of Italy,* 60 Cal. App. 602, 214 Pac. 61;
>
> *Modern Woodmen of America v. Gray,* 113 Cal. App. 729, 299 Pac. 754;
>
> *Union Mutual Life Insur. Co. v. Brockerick,* 196 Cal. 497, 507.

The local law of the state is determinative of the property rights of the parties involved and in defining terms which are not otherwise defined in the taxing statute. *(Poe v. Seaborn, supra.)*

It is upon the application of this rule that the Circuit Court of Appeals for the Fifth Circuit decided in the case of *Newman v. Commissioner of Internal Revenue,* 76 Fed. (2d) 449 (1935), that the proceeds of insurance policies taken out by a husband in Louisiana were includable in the husband's gross estate for federal estate tax purposes. The Court, in the *Newman* case, applied the law of Louisiana, which, it will be noted from the decision, differs in many material respects from the community property laws of Washington and California with reference to the nature of the community interest in insurance.

It appears from the decision in the *Newman* case that the Louisiana wife has no interest in the insurance policies and that she acquires the proceeds thereof as a gift from the husband at the time of his death. It appears

that the wife does not have even an expectancy and thus the husband could defeat the wife of receiving any of the proceeds of said policies by changing the beneficiary thereof prior to his death. Such is not the rule in Washington and California, where the wife has a present, vested and equal interest in the insurance policies and the proceeds thereof with the husband, as shown by the cases cited above.

Further, in the *Newman* case, the Court said:

> "The tax is not upon the proceeds of the policies; it is not upon the interest to which the beneficiary *succeeded* at death, but upon the right of disposition and control the insured had at death. The decedent possessed until his death the full right to change the beneficiary. The tax rests on this fact."
>
> *Newman v. Commissioner of Internal Revenue, supra,* at 450.

A Washington or California husband as above stated has no right to change the beneficiary so as to defeat the wife of her vested one-half interest in the insurance policies or the proceeds thereof; nor does a Washington or California wife *succeed* to the proceeds of an insurance policy, as shown by the cases cited above.

It appears, therefore, that the community property laws of Louisiana do not apply to the proceeds of life insurance policies. See *Ticker v. Metropolitan Life Ins. Co.*, 11 Orleans App. 59, and *Martin v. McAllister,* 94 Tex. 567, 63 S. W. 624, the latter of which cases was relied upon in the *Newman* case, at page 452.

Nor does it appear from the decision in the *Newman* case that the question as to the meaning of the phrase

"taken out by decedent" was presented to the Court for determination, the Court apparently assuming, at page 452 of its decision, that the policies were taken out by the decedent. Compare *Walker v. United States,* 83 Fed. (2d) 104 (C. C. A. 8th, 1936).

We submit, therefore, that *Newman v. Commissioner of Internal Revenue, supra,* though it may perhaps be correct in its holding as applied to Louisiana, can be of no authority in its application to the local laws of Washington and California.

B. Section 302 (g) of the Revenue Act of 1926 requires the inclusion (less permissible exemptions) in the gross estate of the husband of only one-half of the proceeds of insurance paid with community funds, this being the extent of the husband's interest in and to said insurance.

Section 302 (g) reads as follows:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *
>
> "(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

The Commissioner of Internal Revenue under his statutory duty did, from 1918 until 1934, provide in his regulations that the test of whether a policy of life insurance was "taken out by the decedent" was whether the decedent

paid the premiums either directly or indirectly, and to the extent that the premiums were not paid by the decedent, the proceeds were not includable in his gross estate.

The retention of legal incidents of ownership prior to 1934 was not specified as a test and was of importance only in deciding whether certain portions of the Revenue Act of 1926 were to be applied retroactively.

> *Helvering v. Reybine,* 83 Fed. (2d) 215 (C. C. A. 2d, 1936).

The premium payment test adhered to by the Commissioner of Internal Revenue was promulgated first in Regulations 37 issued under the Revenue Act of 1918, and was re-promulgated by the Commissioner substantially in the same language in Regulations 63, interpreting the Revenue Act of 1921, in Regulations 68, interpreting the Revenue Act of 1924, and in Regulations 70, interpreting the Revenue Act of 1926. The applicable portions of said Regulations 70 are set forth in Appendix A; and the applicable portions of said Regulations 37, 63, and 68 are set forth in full in Appendix B.

Section 302 (g), first enacted into the Federal Estate Law in 1919, has been re-enacted in substantially the same form in the Revenue Act of 1921, the Revenue Act of 1924, the Revenue Act of 1926, and the Revenue Act of 1932.

It is a fundamental principle of tax law that when legislative enactments have been re-enacted consistently in continued contemplation of a particular administrative interpretation by way of regulation that the subsequent acts are deemed to have given legislative approval to the administrative regulation. (*McFeely v. Commissioner of Internal Revenue,* 296 U. S. 102, 80 L. Ed. 83; *National*

Lead Co. v. United States, 252 U. S. 140, 40 Sup. Ct. 237, 64 L. Ed. 490 (1920); *McCaughn v. Hershey Chocolate Co.,* 283 U. S. 488, 52 Sup. Ct. 510, 75 L. Ed. 1183 (1931); *Helvering v. Bliss,* 293 U. S. 144, 55 Sup. Ct. 17, 79 L. Ed. 246 (1934); *Walker v. United States,* 83 Fed. (2d) 104 (C. C. A. 8th, 1936).)[2]

Article 25 of Regulations 70 draws a distinction between cases where the insured paid the premium and cases where the beneficiary paid the premium. Thus the regulations provide "the insurance is not deemed to be taken out by the decedent, even though the application is made by him where all the premiums are actually paid by the beneficiary". Where a portion of the premiums are paid by the beneficiary and the remainder of the premiums are paid by the decedent, the regulations state that the policies are to be deemed to have been taken out by the insured in the proportion that the premiums paid by him bear to the total of premiums paid.

Article 25 of Regulations 70 was involved in the decisions of *Helvering v. Reybine, supra,* and *Walker v. United States, supra,* in each of which cases insurance policies had been applied for by the decedent but a portion of the premiums had been paid by the beneficiary.

In the *Reybine* case two of the policies in question were issued in connection with certain trusts created by the

[2]In addition to the administrative construction placed upon the words "taken out by the decedent", we have the judicial construction prior to the passage of the Revenue Act of 1932 of said phrase in the case of *Wilson v. Crooks,* 52 Fed. (2d) 692 (D. C. Mo., 1931), which was then the leading decision interpreting Article 25 of Regulations 70.

insured and the trustees of the trust were named as beneficiaries of the policies. The insured only waived his right to make changes in the beneficiaries of the two policies in question "during the continuance of the trusteeship of certain specified trustees". The insured had the right to remove the trustees during his life and the minority of his children. The decedent died at a time when his children were minors and also when the original trustees were no longer functioning. The Court found the insured had it within his power at the time of his death to *change the beneficiaries of the two policies in question.* Premiums for three of the five years prior to the death of the insured during which time the policies had been in force had been paid by the insured but for the two years preceding the death of the insured the trustees had paid the premiums out of trust income. The Court held that under Article 25 of Regulations 70 the amount of the insurance must be prorated in the proportion which total premiums paid by the insured bore to the total premiums paid by the trust notwithstanding the fact that the insured, at the time of his death, *possessed the important legal incidents of ownership.* As the Court said:

> "The trustees paid these premiums (i. e., the portion paid by the trust) and kept the policies alive. The insured's estate should not now be called upon to pay the tax on all. It would be unjust to tax as part of the decedent's estate that which had been bought and paid for by another." (83 Fed. (2d) 215, 217.)

Likewise, in *Walker v. United States, supra,* decedent had applied for certain policies of insurance in which his wife was made the beneficiary. The wife paid approximately one-half the premium payments made before the death of the husband as to certain of said policies. The

decedent, during his lifetime, possessed the legal incidents of ownership of said policies. The Court after an exhaustive treatment of the legislative re-enactment of section 302 (g) of the Revenue Act, in the light of the administrative interpretation of this section, held that the portion of the proceeds of the insurance policies represented by the premiums paid by the wife should not be included in the gross estate of the decedent.

In the instant case, in addition to the fact that the wife, by virtue of her existing and equal interest in the community property with the husband, paid one-half of the premiums from which the proceeds here under consideration flowed, the decedent in the instant case (as the decisions cited under point "A" of this brief hold) possessed the legal incidents of ownership as to only one-half of the policies here under consideration and, hence, of the proceeds.

In harmony with this Court's decision in *Poe v. Seaborn, supra,* it is proper to consider the law of Washington in determining the property interests upon which the Federal Tax Act is to be applied.

It is, of course, obvious that technical terms in a federal taxing statute are to be accorded the definition specified in the statute, if there is any such definition, and the meaning need not necessarily be the same as might be placed upon the same term under local law. For example, if the term "net estate" is defined in a taxing statute as the gross estate less certain specified deductions the definition of the local law of the term "net estate" would be immaterial. (*Porter v. Commissioner,* 288 U. S. 436, 53 Sup. Ct. 451, 77 L. Ed. 880 (1933).)

However, somewhere along the line there must be terms which are not defined in the taxing statute and in such

event local law is of importance. An example of this fact is found in the leading case of *Poe v. Seaborn,* 282 U. S. 101, 51 Sup. Ct. 58, 75 L. Ed. 239 (1930), where the statute involved imposed a tax upon the net income of individuals. No definition was given of the term "income of individuals" which could guide the Court in determining whether community property income was to be divided between husband and wife. The Supreme Court said, "The act goes no farther, can furnish no other standard or definition of what constitutes an individual's income." Thereupon the Court examined the laws of the state of Washington from which state the particular case in question had arisen and decided that under the statutes of the state community property income of a husband and wife should be apportioned between the husband and wife.

Two decisions interpreting section 302 (g) have similarly applied state law to ascertain whether insurance was taxable. In *Levy's Estate v. Commissioner,* 65 Fed. (2d) 412 (C. C. A. 2d, 1933), the question was whether the provisions of the Revenue Act of 1924 could be applied to certain policies issued prior to 1916. The husband had irrevocably named his wife as beneficiary of these policies. The Court looked to the law of New York, where the policies were taken out, to ascertain whether, under such a situation the husband would have the right to surrender the policies without the consent of the wife. Since the New York decisions held that under the circumstances outlined the consent of the wife was required to a surrender of the policies the Court decided that the statute could not be retroactively applied.

In *Pennsylvania Co. etc. v. Commissioner,* 79 Fed. (2d) 295 (C. C. A. 3d, 1935), cert. den. 296 U. S. 561, 56 S. Ct. 310, a similar result was reached. Here with

reference to one policy which had evidently been taken out a long time prior to the date of the death of the deceased, the decedent had named his wife as beneficiary. While the deceased had not expressly waived his power to change the beneficiary he had not expressly reserved the power. Under the laws of Pennsylvania, where the policies were issued, unless the power to change the beneficiary was specifically reserved the right was deemed waived. The Court applied this Pennsylvania doctrine and held that because the wife was the irrevocable beneficiary the policy could not be surrendered or borrowed upon without the consent of the wife, and therefore the estate had no interest in the policy at the date of the death of the decedent and upon which an estate tax could be imposed.

Accord:

Helvering v. Parker, 84 Fed. (2d) 838 (C. C. A. 8th, 1936).

In the instant case we have a situation directly comparable to that presented to the Supreme Court in *Poe v. Seaborn, supra.* The Estate Tax Law provided for the inclusion of certain insurance under policies "taken out by the decedent upon his own life". No definition is given with respect to when insurance is to be deemed "taken out by the decedent". Article 25 establishes as one test whether the premiums were paid by the beneficiary but this article does not define when premiums are to be deemed paid by the beneficiary. If the Supreme Court of the United States looked to the law of Washington to see what effect community property laws have upon the term "income of every individual" we submit the law of Washington should be examined to determine what effect community property laws would have in determining whether premiums were "paid by a beneficiary".

Under the decision in *Poe v. Seaborn, supra,* income of the community in Washington is to be divided into two portions, one portion of which is to be deemed the income of the husband and the other portion, equal in amount to the husband's interest, is to be deemed the income of the wife. If the premiums on a life insurance policy are paid from community property funds, in the light of the decision in *Poe v. Seaborn,* half of the premiums so paid must be deemed to have been paid from the income of the wife and the remainder from the income of the husband. If a portion of the proceeds has been paid from the income of the wife it is submitted that the conditions of Article 25 of Regulations 70 have been met and the wife has paid a portion of the premiums of the policy, and one-half of the proceeds of such policies are not includable in the gross estate of the decedent.

It would seem to follow from the legislative re-enactment of section 302 (g), in the light of consistent interpretation by the Commissioner, that Regulations 80 is invalid.

It was not until 1934, more than sixteen years after the original enactment of the statute, which statute had been repeatedly re-enacted without substantial change, that the Treasury Department endeavored to change the portion of the regulations above quoted in a material respect. The foregoing history presents an even stronger case for the invalidity of the belated ruling of the Treasury Department than in *Helvering v. Bliss,* 293 U. S. 144, 151, 55 Sup. Ct. 17, 79 L. Ed. 246, 251 (1934), where the Supreme Court said:

> "Moreover, from 1923 to 1932 the Commissioner uniformly ruled that the deduction for charitable contributions was to be taken from net income before

computation of the tax and from ordinary net income. The reenactment in later acts of the section permitting the deduction indicate congressional approval of this administrative interpretation."

Accord:

Mayes v. Paul Jones & Co., 270 Fed. 121, 129, 130 (C. C. A. 6th, 1921).

In *Walker v. United States*, 83 Fed. (2d) 103 (C. C. A. 8th, 1936), the very regulations involved in the instant case were under discussion, the Commissioner contending that Article 25 of Regulations 70 was clearly an erroneous regulation and that Article 25 of Regulations 80, which placed the emphasis upon the incidents of ownership as controlling the taxability of insurance on the life of the decedent, was the correct interpretation of section 302(g) of the Revenue Act. The Court held Article 25 of Regulations 80 invalid.[3]

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[3]"* * * But, if the courts consider themselves bound to follow executive constructions approved by congressional reenactment unless such constructions are 'plainly erroneous', it must follow that they should consider the executive similarly bound and regard * * * subsequent construction by the executive from that standpoint. * * * In *Bliss v. Commissioner* (C. C. A.), 68 Fed. (2d) 890, 893, the Second Circuit held that the subsequent change by the Commissioner did not prevent application of the above rule of construction, and in *Mayes v. Paul Jones & Co.* (C. C. A.), 270 Fed. 121, 129, 130, the Sixth Circuit denied any power in the executive to change, by subsequent regulation, where Congress had adopted a long-continued prior departmental construction.

C. Should this Court deem the applicable regulation to be Articles 25 and 27 of Regulations 80, nevertheless, it is the contention of *amicus curiae* that only one-half of the proceeds of the life insurance policies must be included in the gross estate of the decedent.

Article 25 of Treasury Regulations 80 (full text set out in appendix) established an alternate test to the premium payment test and provided that even though the premiums were paid by the beneficiary the entire proceeds could be considered if the decedent possessed any of the legal incidents of ownership in the policy.

Legal incidents of ownership included such items as the right to the economic benefits of the policy, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a

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"Here Regulations 80 is, in part, a reversal or at least a limitation of Regulations 70. Where Regulations 70 excluded from taxation the proportion of the insurance proceeds paid for by the beneficiary, Regulations 80 does so only if no incidents of ownership in the policy remained in the insured during lifetime. In 70 (as in the earlier Regulations 68), the criterion is payment of premium. In 80 it is incidents of ownership. Considering the language of the statutory provision, it would seem the standard of construction laid down in Regulations 70 is more consonant therewith than that of 80 in those respects where the two are in conflict. At least it is clear that Regulations 80 has not revealed a standard which shows Regulations 70 to be 'clearly erroneous'. The result is that the later regulation cannot under the situation here, be held to replace or change the effect of the earlier regulation; * * *." *Walker v. United States,* 83 Fed. (2d) 103, at 109, 110.

loan, or to obtain from the insurer a loan against the surrender value of the policy, etc.

Under the law of the state of Washington the husband is merely a statutory agent of the community and has no right to alienate the interest of the wife in the property.

> *Poe v. Seaborn,* 282 U. S. 101, 51 Sup. Ct. 58, 75 L. Ed. 239 (1930);
>
> *Schramm v. Steele,* 97 Wash. 309, 166 Pac. 634;
>
> *Occidental Life Insurance Co. v. Powers et al.,* ...... Wash. ......, 74 Pac. (2d) 27 (1937).

It is our contention that Article 25 of Regulations 80 would not apply in so far as the husband, under the community property law, would hold a portion of the economic benefits in trust for the wife. In this respect the decision in *Poe v. Seaborn, supra,* appears controlling. In *Poe v. Seaborn, supra,* the argument of the Government was based upon the contention that, since the husband had the economic benefit of all of the income, an income tax could be levied. As the Court epitomized the argument of the Commission "he asserts that control without accountability is indistinguishable from ownership". In rejecting this contention the Court stated:

> "We are of the opinion that, under the law of Washington, the entire property and income of the community can no more be said to be that of the husband than it could rightfully be termed that of the wife." (282 U. S. 101, 113.)

This is just restating that the economic benefits of the community property belong no more to the husband than to the wife and that the only measure of control that may be given to the husband is as a trustee. In view of

this decision it cannot be said that the husband has the economic benefits required by Article 25 of Regulations 80 any more than a trustee, for example, with power to surrender a life insurance policy and hold the proceeds for the benefit of the beneficiaries of the trust can be said to possess the economic benefits of the policy.

The construction here urged will bring the application of the Federal estate tax as applied to life insurance purchased with community funds in conformity with the interpretation of the Federal Estate Tax Act to community property other than insurance. The Federal estate tax law requires the inclusion of only the one-half interest of the decedent husband in and to the community property.

> *Wardell v. Blum*, 276 Fed. 226 (C. C. A. 9th, 1921); cert. den. 258 U. S. 617, 42 S. Ct. 271.[4]

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[4]It should be noted that, although this case was not followed in later cases because under the Court decision in *United States v. Robbins*, 269 U. S. 315, 46 Sup. Ct. 148, 70 L. Ed. 285 (1926), the fundamental basis upon which *Wardell v. Blum* was decided, namely, that a wife in California had a vested interest in the community property (prior to 1927), was not sustained, yet the reasoning of that case is not affected in its applicability to the state of Washington, since, in *Poe v. Seaborn, supra*, the Supreme Court has declared that the wife does have a vested interest in community property in that state. *Estate of Louise Morris Carroll*, 29 B. T. A. 11 (1933), 32 Ops. Attorney General 435, at 458, G. C. M. 7773, C. B. IX-2, p. 426; *Security-First National Bank of Los Angeles v. Commissioner*, 35 B. T. A. 815, at 824, 825 (1937).

It would seem that Congress intended that insurance should be taxed at least on a no less favorable basis than other property.

In this connection we desire to present to the Court a hypothetical case suggested by the *Estate of Louise Morris Carroll, supra.* Suppose that a life insurance policy, the premiums of which have been paid out of community funds, has been in force and effect for a long while and that the cash surrender value of the policy is almost equivalent to the face value of the policy. Let us suppose, further, that the beneficiary surrenders the policy, shortly before his death, and at his death still has in his possession the entire cash surrender value of the policy. Under all of the applicable decisions, *supra,* it seems that the estate of the decedent husband would only include half of the funds so in the decedent's possession within the estate tax return, whereas, if insurance had not been surrendered and had been in force and effect at the date of the death of the decedent, the construction of section 302(g) reached in the case at bar by the Commissioner would deny to the community the one-half exemption accorded other community property—obviously an inequitable and unwarranted discrimination against insurance.

The construction of section 302(g), here urged by *amicus curiae,* would likewise harmonize the taxing of the proceeds of life insurance policies with that portion of the Federal Estate Tax Act imposing a tax on joint tenancies and tenancies by the entirety. Under section 302(e) of the Revenue Act of 1926, imposing a tax upon joint tenancies and tenancies by the entirety, the amount contributed by the surviving joint tenant or surviving tenant by the entirety is excepted from taxation.

Under the reasoning of *Poe v. Seaborn, supra,* the wife, in the case at bar, has contributed one-half of the funds used to purchase the proceeds of the life insurance policies here involved. If, as has been intimated in *Newman v. Commissioner, supra,* the taxation of the proceeds of life insurance policies is to be based upon an analogy to the taxing of joint tenancies and tenancies by the entirety, it follows that but one-half of the proceeds of such life insurance policies here involved could be subjected to the Federal Estate Tax Act, since the wife has contributed one-half of the funds with which the life insurance was acquired.

If section 302(g) of the Revenue Act of 1926 were given any other construction than is here urged by *amicus curiae* a serious constitutional question, based upon the application of the Fifth Amendment to the Constitution of the United States, would be presented to this Court.

> *Hoeper v. Tax Com. of Wis.,* 284 U. S. 206, 52 Sup. Ct. 120, 76 L. Ed. 248 (1931).

Since, in the instant case, the generating source of the wife's interest is to be found in the fact that during the life of the decedent and herself her interest became fixed and vested, the proceeds of the life insurance cannot be included in decedent's gross estate for taxation purposes.

> *Heiner v. Donnan,* 285 U. S. 312, 52 Sup. Ct. 358, 76 L. Ed. 772 (1932);
>
> *Levy v. Wardell,* 258 U. S. 542, 42 Sup. Ct. 396, 66 L. Ed. 758 (1922);
>
> *Shukert v. Allen,* 273 U. S. 545, 47 Sup. Ct. 461, 71 L. Ed. 764 (1927).

Furthermore, the mere fact that upon the death of the insured monies become payable from the insurance company is not, in itself, deemed a shifting of economic incidents so as to constitute a taxable transaction.

Bingham v. United States, 296 U. S. 211, 56 Sup. Ct. 180, 80 L. Ed. 160 (1935).

This Court has consistently held that where one of two plausible constructions can be placed upon a statute that which does not involve the constitutionality of the statute should be adhered to.

Lucas v. Alexander, 279 U. S. 573, 73 L. Ed. 573, 49 S. Ct. 426 (1929);

Reinecke v. Northern Trust Co., 278 U. S. 339, 73 L. Ed. 410, 49 S. Ct. 123 (1929);

Stratton's Independence, Ltd. v. Howbert, 231 U. S. 399, 58 L. Ed. 285, 34 S. Ct. 136 (1913).

Conclusion.

In the light of the foregoing argument and authorities it is submitted, therefore, that only one-half of the proceeds of insurance upon the life of a decedent, the premiums of which were paid with community funds in which the wife had a vested one-half interest, where said proceeds were payable to the wife of the decedent, should be included in the gross estate (less permissible exemptions), subject to the Federal estate tax.

This determination of the question presented on this appeal and argued herein by *amicus curiae* appears for the

following reasons: (1) that interest of a wife in community property under the laws of the state of Washington and in particular in the proceeds of insurance policies paid for with community funds, is an existing, fixed, and vested interest equal to the interest of the husband; (2) since section 302(g) of the Revenue Act of 1926, as amended, has been consistently reenacted in contemplation of the substance of Articles 25 and 28 of Regulations 70, the executive interpretation made in said articles, and the predecessors thereto, which were substantially the same, is controlling upon this Court, and any contrary executive interpretation by way of regulation is inapplicable as a matter of law; (3) under Article 25 of Regulations 70 payment of premiums being determinative of whether or not insurance is deemed to be taken out by the decedent, insurance paid for with community funds in which the wife has a vested one-half interest is therefore taken out by the decedent only to the extent of one-half thereof; (4) conceding, for the purposes of argument only, that the changed executive interpretation may be applied as set forth in Articles 25 and 27 of Regulations 80, even then such interpretation does not require the inclusion of more than one-half of the proceeds of the insurance, premiums of which were paid from community funds, since the legal incidents of ownership are vested equally one-half in the husband and one-half in the wife; (5) the construction of section 302(g) of the Revenue Act of 1926 here urged by *amicus curiae* would harmonize the taxing of proceeds of life

insurance policies with that of other community property and with that of the taxing of joint tenancies and tenancies by the entirety; (6) the construction of section 302(g) of the Revenue Act of 1926 here urged by *amicus curiae* would avoid the raising of serious constitutional objections.

Respectfully submitted,

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CLAUDE I. PARKER,

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Of Counsel.

APPENDIX A.

REVENUE ACT OF 1926, AS AMENDED.

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *

"(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

REGULATIONS 70, PROMULGATED UNDER THE REVENUE ACT OF 1926.

"Art. 25. Taxable Insurance.—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.

"The term 'insurance' refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is deemed to be taken out by the decedent in all cases where he pays all the premiums, either directly or indirectly, whether or not he makes the application.

On the other hand, the insurance is not deemed to be taken out by the decedent, even though the application is made by him, where all the premiums are actually paid by the beneficiary. Where a portion of the premiums were paid by the beneficiary and the remaining portion by the decedent the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total of premiums paid."

"Art. 28. Valuation of Insurance.—The amount to be returned where the policy is payable to or for the benefit of the estate is the amount receivable. Where the proceeds of a policy are payable to a beneficiary other than to or for the benefit of the estate, and all the premiums were paid by the decedent, the amount to be listed on Schedule C of the return is the full amount receivable, but where the proceeds are so payable and only a portion of the premiums were paid by the decedent, the amount to be listed on such schedule is that proportion of the insurance receivable which the premiums paid by the decedent bear to the total premiums paid. In cases where the proceeds of a policy are made payable to the beneficiary in the form of an annuity for life or for a term of years, the present worth of the annuity at the time of death should be included in the gross estate. For the method of computing the value of such an annuity, see Article 13, subdivision (10). Where the insurance contract gives the right to receive a fixed sum of money in

lieu of an annuity, or other optional settlement, this fixed sum represents the value of the insurance for the purpose of the tax."

Regulations 80, Promulgated Under the Revenue Acts of 1926 and 1932, as Amended.

"Art. 25. Taxable Insurance.—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.

"The term 'insurance' refers to life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge system. Insurance is considered to be taken out by the decedent in all cases, whether or not he makes the application, if he pays the premiums either directly or indirectly, or they are paid by a person other than the beneficiary, or decedent possesses any of the legal incidents of ownership in the policy. Legal incidents of ownership in the policy include, for example: The right of the insured or his estate to its economic benefits, the power to change the beneficiary, to surrender or cancel the policy, to assign it, to revoke an assignment, to pledge it for a loan, or to obtain from the insurer a loan against the surrender value of the policy, etc. The decedent possesses a legal incident of ownership if the rights of the beneficiaries

to receive the proceeds are conditioned upon the beneficiaries surviving the decedent.

"Art. 27. Insurance Receivable by Other Beneficiaries. —The statute requires the inclusion in the gross estate of the decedent of the proceeds of any policy, or the aggregate proceeds of all policies, not receivable by or for the benefit of decedent's estate, to the extent that such proceeds exceed $40,000, regardless of when the policy was or the policies were issued, if the decedent possessed at the time of his death any of the legal incidents of ownership.

"The estate is entitled to only one exemption of $40,000 upon insurance receivable by beneficiaries other than the estate. For example, if the decedent left life insurance payable to three such beneficiaries in amounts of $10,000, $40,000, and $50,000 (total $100,000), the full amount should be listed on the return and therefrom subtracted the $40,000 exemption as provided in Schedule C of Form 706. The word 'beneficiaries' as used in reference to the $40,000 exemption, means persons entitled to the actual enjoyment of the insurance money."

APPENDIX B.

Regulations 37, Promulgated Under the Revenue Act of 1918.

"Art. 32. Taxable Insurance.—The statute provides for the inclusion in the gross estate of certain forms of insurance taken out by the decedent upon his own life. Two kinds of insurance are taxable: (a) all insurance payable to the estate; (b) insurance payable to individual beneficiaries to the extent that it exceeds $40,000. The term 'insurance' refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is deemed to be taken out by the decedent in all cases where he pays the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance should not be included in the gross estate, even though the application is made by the decedent, where the premiums are actually paid by some other person or corporation, and not out of funds belonging to, or advanced by, the decedent. Where the decedent takes out insurance in favor of another person or corporation, as collateral security for a loan or other accommodation, and the decedent, either directly or indirectly, pays the premiums thereon, the insurance must be considered in determining whether there is an excess over $40,000. Where the decedent assigns a policy, and retains no interest therein, and thereafter pays no part of the premiums, the insurance will not be considered in determining whether there is such a taxable excess."

"Art. 34. Insurance Receivable by Other Beneficiaries.—The estate is entitled to only one exemption of $40,000 upon insurance payable to beneficiaries other than the executor. For example, if the decedent left life insurance payable to three persons in amounts of $10,000, $40,000, and $50,000 (total $100,000), the amount of $60,000 should be returned for taxation, which is the excess of the sum of the three policies over the exempted amount. The word 'beneficiary,' as used in reference to the $40,000 exemption, means a person entitled to the actual enjoyment of the insurance money."

REGULATIONS 63, PROMULGATED UNDER THE REVENUE ACT OF 1921.

"Art. 27. Taxable Insurance.—The statute provides for the inclusion in the gross estate of certain forms of insurance taken out by the decedent upon his own life. Two kinds of insurance are taxable: (a) all insurance receivable by, or for the benefit of the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000. The term 'insurance' refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is deemed to be taken out by the decedent in all cases where he pays the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance is not deemed to be taken out by the decedent, even though the application is made by him, where the premiums are actually paid by the beneficiary, who may be either a person or a corporation. Where the decedent takes out insurance in favor of another person or corporation, as collateral security for a loan or other accommodation, and either directly

or indirectly, pays the premiums thereon, the insurance must be considered in determining whether there is an excess over $40,000. The amount of the loan outstanding at decedent's death, with interest accrued thereon to that date, will be deductible in determining the net estate. (See Art. 39.) Where the decedent assigns a policy, and retains no interest therein, and thereafter pays no part of the premiums, the insurance will not be considered in determining whether there is such an excess."

REGULATIONS 68, PROMULGATED UNDER THE REVENUE ACT OF 1924.

"Art. 25. Taxable Insurance.—The statute provides for the inclusion in the gross estate of insurance taken out by the decedent upon his own life, as follows: (a) All insurance receivable by, or for the benefit of, the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000.

"The term 'insurance' refers to life insurance of every description, including death benefits paid by fraternal beneficial societies, operating under the lodge system. Insurance is deemed to be taken out by the decedent in all cases where he pays all the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance is not deemed to be taken out by the decedent, even though the application is made by him, where all the premiums are actually paid by the beneficiary. Where a portion of the premiums were paid by the beneficiary and the remaining portion by the decedent the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total of premiums paid. Where

the decedent takes out insurance in favor of another person or corporation as collateral security for a loan or other accommodation and, either directly or indirectly, pays the premiums thereon, the insurance must be considered in determining whether there is an excess over $40,000. The amount of the loan outstanding at decedent's death, with interest accrued thereon to that date, will be deductible in determining the net estate. (See Art. 29.)

"Insurance payable to beneficiaries other than the estate, or for the benefit of the estate, need not be included in the gross estate of a decedent who died before the effective date of Title IV of the Revenue Act of 1918, but where the decedent assigned a policy of insurance payable to or for the benefit of his estate, or caused it to be made payable to a specific beneficiary in contemplation of or intended to take effect in possession or enjoyment at or after his death, it should be included if the assignment or change did not amount to a bona fide sale for a fair consideration in money or money's worth."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 919

RICHARD E. LANG, EXECUTOR, and GRACE E. LANG, EXECUTRIX, of the Estate of JULIUS C. LANG, Deceased,

Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF OF AMICUS CURIAE.

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HAUSER PRINTING CO., NEW ORLEANS

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BRIEF OF AMICUS CURIAE.

May It Please the Court:

I.

PURPOSE OF BRIEF OF AMICUS CURIAE

This brief is filed with the consent of Messrs. Wright, Jones & Bronson, Counsel for the executors. The Attorney General representing the Commissioner does not oppose the filing of this brief but wishes it to be stated that he believes that consideration of Louisiana law will not aid the Court for the reason that it is different from Washington law.

It is the belief of *amicus curiae* that the law of the State of Washington involved in this case is so similar to the law of Louisiana on the same subject that a

statement of the law of Louisiana will assist the Court in determination of the questions certified by the 9th Circuit Court of Appeals. Because of the similarity in the law it is submitted that a decison in this case should be applicable to Louisiana taxpayers similarly situated, and to this end this brief is respectfully submitted in an endeavor to place before the Court a concise statement of the relevant law of Louisiana.

II.

STATEMENT OF QUESTION

On March 18, 1938, the Circuit Court of Appeals for the Ninth Circuit certified to this Court the following questions of law upon which the said Circuit Court of Appeals for the Ninth Circuit desired instructions for a proper decision of this case. The questions certified are as follows, set out in the record and presented in petitioner's brief, page 3.

In its statement of the case, the Circuit Court of Appeals for the Ninth Circuit stated that this case involved seventeen policies of life insurance in fourteen of which his wife was named beneficiary and in three, his children. Fourteen of the policies were taken out by the decedent after his marriage to his wife in 1905. Three were taken out prior to his marriage. During his marriage, all premiums on these policies were paid with community funds. We will direct our argument principally to the question of the status of policies to named beneficiaries taken out during marriage when the premiums are paid with community funds.

III.

RELEVANT PROVISIONS OF FEDERAL STATUTE

This case arises under Section 302 (a) of the *Revenue Act of 1926* which provides as follows:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * * *
>
> "(g) To the extent of the amounts receivable by the Executor of insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance taken out by decedent upon his own life."

The Commissioner of Internal Revenue determined a deficiency against the decedent's estate herein based upon his ruling that the entire proceeds of these insurance policies payable to named beneficiaries should be included in determining the amount taxable in the gross estate, thereby creating an excess over $40,000.00 in the total. This determination of the Commissioner was appealed to the Board of Tax Appeals which affirmed the Commissioner's finding in 34 B.T.A. 337. Appeal was then taken to the Court of Appeals for the Ninth Circuit.

IV.

ARGUMENT

A. STATEMENT OF COMMUNITY PROPERTY LAW OF LOUISIANA

This Court had occasion to review the community property law of Louisiana in the case of *Bender v. Pfaff*, 282 U. S. 127, holding in that case that the wife had a right to treat one-half of the community income as her income

for the purpose of the Federal income tax. In that case, this Court recognized that the Courts of Louisiana had unequivocally declared that the wife's half interest in the community property is not a mere expectancy during marriage, but that the wife has a present vested interest in community property equal to that of her husband. *Phillips v. Phillips*, 160 La. 813; Louisiana Revised Civil Code, Articles 915, 2334, 2399, 2402, 2404; *Succession of Marsal*, 118 La. 212; *Succession of May*, 120 La. 692; *Beck vs. Natalie Oil Co.*, 143 La. 154; *Niedman vs. Fontenot*, 275 Fed. 688; *Warburton vs. White*, 176 U. S. 484; *Arnett vs. Reade*, 220 U. S. 311; *Dixon vs. Dixon Executors*, 4 La. 188; *Theall vs. Theall*, 7 La. 226; *Bek vs. Miller*, 8 Fed. (2d) 797; *Ricker vs. Blair*, 32 Fed. (2d) 222; *McLarry vs. Commissioner*, 30 Fed. (2d) 789; Baudry-Lacantinerie Vol. 15, Section 247; Planiol & Ripert, Traite Pratique de Droit Civil Francaise 1925, Vol. 8, Sections 156 to 158, 516.

In that case, it was also recognized by this Court that in Louisiana a husband has power to dispose by testamentary disposition of only his one-half of the community property. See R.C.C. 515; *Theall vs. Theall, supra; Ramsey vs. Beck*, 151 La. 190. Also it was recognized that the wife may dispose of her one-half of the community by testamentary disposition and the husband is powerless to prevent it. See Civil Code Articles 915 and 916; *Succession of Haynes*, 33 La. Ann. 1143; *Succession of Moore*, 40 La. Ann. 531. Further that if the husband prove to be a bad manager or becomes involved in financial difficulties, the wife may bring about an immediate dissolution and liquidation of the community. *Wolf & Clark v. Lowry*, 10 La. Ann. 272; *Webb v. Bell*, 24 La. Ann. 75; *Brown & Learned v. Smythe*, 40 La. Ann. 325. Further that when she sues for separation or divorce, a wife is entitled to a strict accounting from the husband for the communtiy property and to reimbursement and retribution for any acts done

by him in fraud of her rights. *Hill vs. Hill,* 115 La. 489; *White vs. White,* 159 La. 1055.

It has been repeatedly held by the Supreme Court of Louisiana that if the husband uses community income to improve his separate estate or to pay his separate debts, his separate estate becomes the community's debtor to that extent. See in this connection Article 2404 of the Civil Code; *Glenn vs. Elam,* 3 La. Ann. 611 *Dillon vs. Freyville,* 129 La. 1005; *Succession of Casey,* 130 La. 743; *Succession of Goll,* 156, La. 910; *Childers vs. Johnson,* 6 La. Ann. 634.

Policies taken out Prior to Effective Date of the Revenue Act of 1918 are Not Taxable at all.

B. *THE STATUS OF LIFE INSURANCE TAKEN OUT DURING COMMUNITY IN LOUISIANA*

The general rule in Louisiana is that all property acquired during marriage, with the exception of donations made to individual spouses, the wife's action for damages for personal injuries and the separate earnings of the wife, are community property. *Civil Code Art. 2402,* provides as follows:

> "Property forming community—Personal injuries to wife.—**This** partnership or **community consists** of the profits of all the effects of which the husband has the administration and enjoyment, either of right or in fact, of the produce of the reciprocal industry and labor of both husband and wife, and **of the estate which they may acquire during the marriage,** either by donations made jointly to them both, or **by purchase, or in any other similar way, even although the purchase be only in the name of one of the two and not of both,** because in that case the period of time when

> the purchase is made is alone attended to, and not the person who made the purchase. But damages resulting from personal injuries to the wife shall not form part of this community, but shall always be and remain the separate property of the wife and recoverable by herself alone; 'provided where the injuries sustained by the wife result in her death, the right to recover damages shall be as now provided for by existing laws'." (Emphasis ours).

There is a very strong presumption that all property **acquired during** marriage is community property. *Schwab v. Hava*, 154 La. 922, 98 So. 420; *Garlic v. Dalby*, 147 La. 18, 84 So. 411; *Barnes v. Thompson*, 154 La. 1036, 98 So. 657; *Ramsey v. Beck*, 151 La. 190, 91 So. 674; *Schoeffner v. Schoeffner*, 163 La. 142, 111 So. 655; *Guaranty Bank & Trust Company v. Hunter*, 173 La. 497, 137 So. 904; *Busby v. Busby*, 168 La. 510, 122 So. 599. The time of acquisition is a determining factor.

Thus, land purchased by a husband prior to his marriage is his separate property, and if he pays part of the purchase price with community funds after marriage his separate estate is indebted to the marital partnership for such payments. *Civil Code Article* 2408. Compare *Succession of Rouss*, 144 La. 143, 80 So. 229. Likewise, property acquired by husband after marriage is community property, the time of purchase determining the status. *Jefferson v. Stringfellow*, 148 La. 223, 86 So. 774. So even where the husband purchases land with his separate funds the land becomes community property unless there is a specific recital in the act of purchase stating that separate funds were used. *Ramsey v. Beck*, 151 La. 190. Even though it is clearly shown in the case of an acquisition by a husband that the money used was his separate and paraphernal property, the land acquired

will be community property in the absence of a specific recital in the deed, the presumption being conclusive. *Schoeffner v. Schoeffner, supra.* In the case of an acquisition of land by a married woman, if there is no recital in the deed that separate funds are used, the presumption that the property is community can only be rebutted by evidence of the clearest character that the funds used were entirely the wife's separate property. *Succession of Manning,* 150 La. 1008, 91 So. 435. So also property acquired during marriage by prescription becomes community property. *Crouch v. Richardson,* 158 La. 822, 104 So. 729. See also *Succession of Watkins,* 156 La. 1000, 101 So. 395. Even personal clothing bought by the wife belongs to the community. *Munch v. Central Laundry Company, Ltd.,* 2 La. App. 123. The same rule applies to a business and all its assets, including accounts receivable, etc. *Barnes v. Thompson,* 154 La. 1036, so, likewise, rents collected from separate property fall into the community. *Peters v. Klein,* 161 La. 664, 109 So. 349. In the same manner, the servitude of mineral rights reserved in a conveyance fall into the community. *Sample v. Whitaker,* 172 La. 722, 135 So. 38.

Since there is a very strong presumption that all property rights and assets of any character acquired during the community become community property, which presumption can in no case be rebutted except (in some cases) by showing that the property in question was acquired with separate funds it would be natural to suppose that insurance policies taken out during marriage and paid for with community funds would also be considered community property. **This is precisely the case** and it was squarely so held in the *Succession of LeBlanc,* 142 La. 27, 76 So. 223. In that case the Supreme Court of Louisiana said:

"The status of the proceeds or avails of such life insurance—that is, whether it is community property or property of the separate estate of the insured—depends on whether the contract or insurance was made during the marital community or when the insured was single. The status of the proceeds or avails of such insurance, whether community property or the separate property of the insured, is not governed by the marital status of the insured at the time of his death."

See also in this connection *Succession of Buddig,* 108 La. 406, 32 So. 361, where it was specifically held that a policy of life insurance issued to a married man during the existence of the community falls into the community and not his separate estate, the Court saying in this case:

"He (the husband) has no right to transact so as to build up a separate estate to the disadvantage of the community. As to him primarily all the property belongs to the community".

See also *Succession of Verneuille,* 120 La. 605, 45 So. 520. In this case the policies were taken out by the husband prior to his marriage and it was held that the proceeds belonged to his separate estate, the Court saying:

"The date of the right is the date of the policy and from that time on it remains the property of the insured * * * ".

Referring, however, to the question of whether the community was entitled to reimbursement for premiums paid with community funds, the Court said:

"The community is unquestionably entitled to the amount. The separate estate cannot be benefited by payments for its benefit and not be indebted for them".

The case of *Succession of Jones*, 185 La. 377, is also directly in point involving war risk insurance.

The bar of Louisiana is amazed by the interpretation given Louisiana law by Texas Judge Hutcheson and concurred in by Florida Judge Brian, with Georgia Judge Sibley dissenting, in *Newman v. Commissioner of Internal Revenue*, 76 Fed. 2nd 449. This case involves the same point now before this Court. We call the Court's attention to the able dissenting opinion of Judge Sibley in this case, which for convenience we have set out in full in an appendix hereto.

Before considering the opinion in that case we wish to eliminate confusion by pointing out that by particular statute (Act 189 of 1914 and Act 88 of 1916) it is provided in Louisiana that the proceeds of insurance, however payable, are exempt from seizure by creditors (see *Succession of Irwin*, 169 La. 877, 126 So. 223), and that such proceeds are not for Louisiana inheritance tax purposes considered part of the estate of the decedent. *Succession of Hedden*, 146 So. 732. Nor do the Inheritance Tax laws of Louisiana tax the right of the decedent to change the beneficiary as do, in practical effect, the Federal Estate Tax laws. Compare in this connection *Chase National Bank v. the United States*, 278 U. S. 327, 73 L. Ed. 405. Louisiana law simply regards insurance policies as third party beneficiary contracts or contracts *pour autrui*.

Also we would like to define our terms. The "beneficiary", to whom the policy is payable, the "insured", whose life is insured, the "owner" of the policy, who is the person or persons who either originally "takes out" the policy or presently controls the right to surrender the policy or to change the beneficiary, and the "insuror," the company carrying the insurance, each have separate interests. Note particularly that the **benefi-**

ciary and the **owner** represent different interests which are separate although both separate interests may be in one person wholly or in part. Thus, in the case of a policy taken out by a partnership or a marital community on the life of one partner, payable to the other, one partner has both a beneficial interest and an ownership interest, while the other is both an owner and the insured.

Referring to Judge Hutcheson's opinion in *Newman v. the Commissioner, supra,* we agree that the tax here is not on the proceeds but upon the ownership right of disposition and control. The question passed over by Judge Hutcheson is who has this right of disposition or control, which is the subject of the tax. This right of disposition was acquired during the community and with community funds. True, it is nominally exercised by the husband, but so are all other rights with respect to community property, since the husband is specifically made the head and master of the community. *Civil Code Art.* 2403. Under the reasoning of Judge Hutcheson, all property comprising the community should be included in the husband's estate. There is no warrant for assuming that the husband has any greater rights or greater freedom with respect to his exercise of the right to change the beneficiary than he has with respect to any other community property. He is subject to the same limitations pointed out above. We have shown above that the presumption that all property acquired during community is community property specifically applies to insurance policies. *Succession of Buddig, supra; Succession of Verneuille, supra; Succession of LeBlanc, supra; Succession of Jones, supra.* It is plain, therefore, that this reserved "ownership right of disposition or control" is a community right.

If this were not so, the husband could defraud the

wife of all her interest in the community property by simply taking out paid up policies, using for this purpose all the community funds, naming her as beneficiary and then changing the beneficiary to some third party, or else simply cashing in the policy. If this ownership right to change the beneficiary and control the policy is the separate property of the husband the wife would have no recourse against such action on the part of the husband.

In the event the husband changed the name of the beneficiary of the policy from his wife to his executors, then if the policy were taken out during the community there is no question but that the policy and all its rights would be community property. *Suc. of Jones, supra; Succession of LeBlanc, supra.* If he then again changed the name of the beneficiary to his wife or a third party, would this exercise of this right change the **nature of the right itself** from community property to **his separate property?** It is submitted that it is inconceivable that the husband could thus transfer **community property** to **his separate estate** without any action on the part of the wife.

Judge Hutcheson rightly points out that policies payable to the wife are regarded as gifts to the wife by Louisiana law. *Succession of DeForges,* 135 La. 49, 64 So. 970. This, however, is entirely beside the point, since it is simply a gift of the beneficiary interest with which we have no concern here. If it were a completed and irrevocable gift then it certainly would not be taxable at all. Compare *Chase National Bank v. United States,* 278 U. S. 327, 73 L. E. 405. It is not, however, a completed and irrevocable gift under Louisiana law where the right to change beneficiary is reserved. *Douglass v. Equitable Life Assurance Society,* 150 La. 519, 94 So. 834. We are here dealing only with the right of disposition or incidents of ownership, which are by hypothesis not given to the wife.

In order to consider this right of disposition as the separate property of the husband and taxable in full to him, it is necessary to be inconsistent with the Louisiana Civil Code articles and all those decisions of the Supreme Court of Louisiana, which uniformly decree that **all assets acquired during marriage with community funds are community property.**

Referring to the specific words of the Revenue Act in question we see that the only insurance included is that "taken out by decedent upon his own life". We have seen *supra* that property acquired in the name of either spouse during community regime is not acquired **by** the particular spouse but is acquired **by** the marital partnership. In Louisiana an insurance policy on the life of the husband payable to the wife and paid for with community funds is not **taken out** by the husband but **is taken out by the community.** It therefore seems highly doubtful whether such policies are within the taxing statute at all, and certainly not more than an undivided one-half could be considered to be taken out by the decedent and as such includable in his estate.

It is submitted that there is no distinction in this respect between the question here presented and the case of a partnership where one partner takes out, on behalf of the partnership, insurance on his own life, payable to the partnership or one of the other partners. In such a case it has been determined that such insurance is not includable in the estate of the deceased partner. See *Scovell v. Commissioner,* 30 B.T.A. 679. Compare also the case of insurance taken out by an officer of a corporation on his own life for the benefit of the corporation. *Wilson v. Crooks,* 52 Fed. 2nd. 692.

The precise question here involved was before the Board of Tax Appeals in Estate of *Louisa Morris Carrol*

v. the Commissioner, 29 B.T.A. 11. In this case the husband took out four policies payable to **his** executors. The wife died before the husband and the question was whether one-half the cash surrender value of the policies should be included in the estate of the wife. Note that this case also involved "ownership" rights rather than beneficiary rights. In this case the Commissioner successfully contended that insurance taken out during the community was community property and the Board of Tax Appeals held that one-half the cash surrender value was includable in her estate.

Judge Hutcheson's decision leads to the ludicrous result that where the husband makes the policy payable to **his** estate, only one half is actually included in his estate; but where he makes it payable to **his wife,** the full amount is included in his estate. Judge Hutcheson reaches this astonishing result, on the ground that the Louisiana law considers the latter policy a gift to the wife. **Summarized —if he gives it to his wife, it is all his; if he gives it to himself his wife gets half.**

It is submitted, therefore, that the opinion in *Newman v. Commissioner, supra,* does not meet the point involved, which is the status of the right of disposition, the subject of the tax. It is further submitted that a careful consideration of Louisiana law leads to the inevitable conclusion that this right so taxed is a community right in which the husband has only an undivided one-half interest.

Indeed, the departmental regulations, Art. 25, Regulations 70, provided that the payment of premiums was the measure of the amount of insurance to be included in decedent's estate; that is to say, insurance was includable only in the proportion that the premiums paid by decedent bore to the total premiums paid. These regulations were in force and acted upon for many years. during

which time the act in question and the particular section in question was re-enacted by Congress without material change. It is submitted that this contemporaneous administration construction, together with the reenactment of the act of Congress in substantially the same language in view of such administrative construction, constituting a legislature adoption of such construction, should be followed by the Courts. We respectfully refer the Court in this connection to the case of *Walker v. The United States*, 83 Fed. 2nd. 103 involving the precise question.

We wish to point out finally that the position urged by us is the one which is consistent with the purpose and intent of Congress in enacting Section 302 (g) of the Revenue Act, which was to prevent the diminution of the decedent's taxable estate through the purchase of insurance policies. Since one-half of the money used to pay premiums was from the wife's one-half of the community, and such one-half of such monies would not in any event have been included in the decedent's taxable estate, our position that the tax should be based on only one-half of the proceeds of the policies is in accordance with the intent of Congress.

We submit that a very serious constitutional question is raised by the present Regulations and by the decision in the *Newman* case, since the tax will be based in part on property which never at any time formed part of decedent's estate. It is submitted that this is beyond the reasonable and constitutional limitations of an estate tax. *Cf.. Heiner v. Donnan*, 285 U. S. 312; *Schlesinger v. Wisconsin*, 270 U. S. 230. An estate tax on one man, measured by another man's property, is the net result of the Regulations and the *Newman* case. A tax on the incidents of ownership in this case, if the *Newman* case is followed, would not be a genuine tax on a substitute for testamen-

tary disposition, which is and must be the dominant purpose of the provision of Section 302(g). *Cf. U. S. v. Wells*, 283 U. S. 102.

C. *IF INSURANCE IS TAXABLE IN FULL TO HUSBAND, HUSBAND'S ESTATE IS INDEBTED TO COMMUNITY FOR THE PREMIUMS*

This proposition seems self-evident. Assuming that the right of disposition is entirely in the husband, if he purchased this right for his separate estate with community funds, his estate surely must be indebted to the community for the community funds which he used to thus enrichen his separate estate. This point was squarely passed upon in *Succession of Buddig, supra,* and *Succession of Verneuille, supra,* (see quotation page ..., *supra*) and *Estate of Moreman,* 38 La. Ann. 219. This is the specific provision of Civil Code **Art. 2408.** It has been repeatedly held that the separate estate of one spouse cannot be enriched at the expense of the community. See *Kelly v. Robertson,* 10 La. Ann. 303; *Whiteman v. LeBlanc,* 28 La. Ann. 430; *Domunguez v. Lee,* 17 La. 295; *Peters v. Klein, supra, Succession of Webre,* 49 Ann. 1491, 22 So. 930; *Succession of Burke,* 107 La. 82, 31 So. 391; *Succession of Goll,* 156 La. 910, 101 So. 263; *Kendall v. Kendall,* 174 La. 148, 140 So. 6.

In *Newman v. the Commissioner,* Judge Hutcheson holds that there is no such claim since a policy payable to the wife is under Louisiana law considered a gift by the husband to the wife. It is submitted that this again begs the question. If it were a completed and irrevocable gift there would be no tax as shown *supra.* We are dealing only with the right to change the beneficiary and we are assuming here that this right is exclusively in the husband. To support the gift theory it would be necessary for Judge

Hutcheson to hold that the wife had made a gift of her one-half of the community funds used for the premiums to the husband to give him this exclusive right. Such a holding is impossible under Louisiana law, since none of the legal requirements for a gift have been complied with. Under Louisiana law a gift can be either by notarial act or can be a manual gift. In the case of a manual gift an actual physical delivery is necessary and strict proof of this is required. See *Civil Code Articles* 1536 through 1540. There is no showing that the wife made any such manual delivery of the funds, and in fact she did not do so.

The precise question of contributions for premiums where the wife is the named beneficiary has never arisen in Louisiana because (1) under Louisiana law the right reserved to change the beneficiary would be considered community property, and (2) because under the law of Louisiana the right to change the benficiary is not subject to Louisiana inheritance taxes. However, it is clearly established that the community is entitled to reimbursement of funds used to pay premiums on policies taken out by a husband prior to his marriage. See *Succession of Buddig, supra.*

CONCLUSION

It is submitted, in conclusion, that under the law of Louisiana, where insurance policies are taken out in the name of a husband during marriage, where the premiums are paid with community funds, where the wife is named as beneficiary and where the right to change the beneficiary is reserved, the reserved ownership right in the policy is community property, just as any other asset acquired during marriage with community funds. It is

further submitted that the precise questions involved are not met in the opinion of *Newman v. the Commissioner*, 76 Fed. 2nd, 449, and that the decision in that case should be reversed and the dissenting opinion of Judge Sibley in that case made the rule by this Court. It is further submitted that the first question certified by the Circuit Court of Appeals for the Ninth Circuit should be answered by holding that only one-half of the insurance should be deemed "taken out by the husband" and only one half of the proceeds included in his estate.

Respectfully submitted,

J. BLANC MONROE,
MONTE M. LEMANN,
J. RABURN MONROE,
Attorneys for Respondent.

APPENDIX

Dissenting opinion of Judge Sibley in *Newman v. Commissioner*, 76 Fed. (2nd) 449:

"I believe in the reality of the wife's interest in the Louisiana marital community, and I believe in the iniquity of taxing a decedent's estate with respect to wealth which he never owned. This creed compels me to dissent. The Louisiana Code speaks of the community always as a partnership, the husband being its manager. Arts 2399, 2402, 2403, 2404, 2406, 2409, 2410, 2411. Though the husband has large powers, they are not absolute. Art. 2404. And the wife's interest is not a mere expectancy but a present vested title. *Phillips vs. Phillips*, 160 La. 813, 107 So. 584. 'In Louisiana the wife has a present vested interest in community property equal to that of the husband.' *Bender vs. Pfaff*, 282 U. S. 127, 51 S. Ct. 64, 65, 75 L. Ed. 252, affirming (D. C.) 38 F. 2d) 642, *Id.* (C. C. A.) 38 Fed. (2d) 649. The federal estate tax law here involved, Rev. Act of 1926, §302, 26 U. S. C. A. §1094, after dealing with the case of insurance payable to the estate, directs the inclusion in the estate, for measuring the tax imposed upon its devolution, of 'the excess over $40,000 * * * receivable by all other beneficiaries as insurance under policies *taken out by the decedent upon his own life.*' Regulation 70, Art. 25, construes the words 'taken out by the decedent' thus: 'Insurance shall be deemed to be taken out by the decedent in all cases where he *pays all the premiums* either directly or indirectly, whether or not he makes the application. On the other hand the insurance is not deemed to be taken out by the decedent even though the application is made by him where *all the premiums are actually paid by the beneficiary.* Where a *portion of the premiums were paid* by the beneficiary and the remaining

portion by the decedent, the insurance will be deemed to have been taken out by the latter *in the proportion that the premiums paid by him* bear to the total premiums paid.' (Italics added). The suggestion that the Regulation is opposed to the statute is not sustainable. The words 'taken out by the decedent' are ambiguous and may refer in a narrow sense to the act of applying for the insurance; or they may have a broader reference to the whole course of the insurance and to its economic source. The Secretary in making the interpretative regulation has from the beginning rejected the making of the application as the important thing. Such a construction could lead to great absurdity and injustice. The construction adopted and consistently adhered to is that the Congress, seeking to measure the death tax by the value of the decedent's estate and to abort all effort to avoid the tax by antecedent dispositions made in contemplation of death or ripened by death, must have meant that insurance on the decedent's life paid for by the decedent in whole or in part, no matter who made the application, was taken out by him to the extent that he paid for it.* The repeated reenactment of the same statutory words strongly indicates legislative approval and adoption of the executive construction. *Brewster vs. Gage*, 280 U. S. 327, 328, 337, 50 S. Ct. 115, 74 L. Ed. 457; *Massachusetts Mutual Life Ins. Co. v. United States*, 288 U. S. 269, 53 S. Ct. 337, 77 L. Ed. 739; *Burnett v. Brooks*, 288 U. S. 378, 379, 53 S. Ct. 457, 77 L. Ed. 844, 86 A.L.R. 747. Taking the Regulation therefore at its face value, who applied for the insurance is immaterial; the question is who paid the premiums which created it? The thought is that although the insurance is to go to the appointed beneficiary and the federal

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*Art. 32 of the Regulations under the Revenue Act of 1918 is quoted in Thurber, Federal Estate Taxes (1921) § 77. The identical words of that statute are re-enacted in Revenue Acts of 1921, § 402 (f) 1924 § 302 (g) and 1926 § 302 (g). 42 Stats. p. 279. 43 Stats. p. 305 (26 USCA § 1094 note). 44 Stats. p. 71 (26 USCA § 1094 (g).

law does not seek to interfere with that, still the insurance contract represents an investment of the premiums, and so far as the decedent thus invested his money which would otherwise have been a part of his estate, that far the disposition, especially when he reserves the right to change the beneficiary, may be considered both as in contemplation of death and as incomplete until death and justly to be included in measuring his estate tax. It is wholly a question of federal law. The law of Louisiana as to who gets the insurance and what account if any is due to the community estate where the premiums are paid out of it is wholly immaterial. The federal statute asks but one question, Whose money paid the premiums? In this case there can be but one answer. It was money which belonged equally to the husband and wife. Both equally paid the premiums. The husband paid only half. Only half of the resulting investment is to be included in measuring this tax.

"The decisions cited in the prevailing opinion touching estates by the entirety do not help its argument, for as stated in *Tyler vs. United States*, 281 U. S. 497 at pages 500, 501, 505, 50 S. Ct. 356, 358, 74 L. Ed. 991, 69 A.L.R. 758, the statute expressly included such estates but also expressly excepted 'such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent'; and as to the estate held to be taxable it is said: 'None of the property constituting it had, prior to its creation, ever belonged to the surviving spouse.' Here half of the original investment did belong to the surviving spouse, and the applicable statute rightly interpreted excepts her half. This interpretation is supported by its consistency with the provision regarding estates by the entirety. I think only half of this insurance represents an investment of funds of the decedent and only half ought to be included in measuring his estate tax."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 919

RICHARD E. LANG, EXECUTOR, and GRACE E. LANG, EXECUTRIX, of the Estate of JULIUS C. LANG, Deceased,

Petitioners,

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

CORRECTIONS TO BRIEF IN AMICUS CURIAE.

May It Please the Court:

Because of the haste with which it was necessary to prepare the brief of *amicus curiae* heretofore filed, cer-

tain errors have crept into the final brief, and we respectfully submit the following corrections:

(1) Page 2, Part II, line 2, eliminate the words "the following".

(2) Line 6 of the same page and paragraph eliminate "as follows,".

(3) Page 5, Eliminate dark printing reading as follows:

> "Policies taken out prior to effective date of Revenue Act of 1918 are not taxable at all."

(4) Page 9, line 17, after the word "proceeds", insert "when payable to named beneficiaries."

(5) Page 9, line 19, after period, insert "compare *Succession of Hedden,* 140 So. 851, and *Succession of Hedden,* 146 So. 732."

(6) Page 15, line 8 of paragraph C, in blank insert the figure "8".

(7) Page 17, last line, substitute the words "Attorneys for *Amicus Curiae*" for the words "Attorneys for Respondent."

Respectfully submitted,

J. BLANC MONROE,
MONTE M. LEMANN,
J. RABURN MONROE,
Attorneys for Amicus Curiae.

Office - Supreme Court, U. S.
FILED

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OF THE
UNITED STATES

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STATE OF WASHINGTON'S BRIEF AMICUS CURIAE

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STATE OF WASHINGTON'S BRIEF AMICUS CURIAE

QUESTION

Are the entire proceeds of the life insurance policy taken out by the husband on his life, subject to an estate tax under the community property laws of the State of Washington?

Washington Community Property Law

The community property statutes construed by the decisions of the Supreme Court of Washington disclose that, during the life of her husband, the wife has nothing that she can call her own so far as management, control or enjoyment is concerned. She can be deprived of her interest, both real and personal, in the community property by her husband, over her protest and without her signature, as though she does not exist.

Possession and Enjoyment Pass at Death

By the death of her husband the wife, for the first time, comes into the management, control and enjoyment of her interest in the community property, and it is therefore subject to a tax.

Wife Has No Vested Interest in Community Life Insurance

The wife has no vested nor other interest in a community life insurance policy that she cannot be deprived of by her husband against her will and over her protest and without her signature.

The Supreme Court of Washington, referring to this fact, in 1934 said:

> "In view of that fact, the beneficiary (the wife) did not acquire a permanent or vested interest in the policy; all that she acquired was an expectancy." *Seattle Association of Credit Men v. Bank of California,* 177 Wash. 130 at 138, 30 Pac. (2d) 972.

Entire Community Life Insurance Taxable

The statute of the State of Washington taxes the "entire" proceeds of life insurance payable on the life of decedent, even though the community pays the premium, under the following provision:

"Insurance payable upon the death of any person shall be deemed a part of the estate for the purpose of computing the inheritance tax and shall be taxable to the person, partnership or corporation entitled thereto. Such insurance shall be taxable irrespective of the fact that the premiums of the policy have been paid by some person, partnership or corportaion other than the insured, or paid out of the income accruing from principle provided by the assured for such payment, whether such principal was donated in trust or otherwise: *Provided, however,* That there is exempt from the total amount of insurance, regardless of the number of policies, the sum of forty thousand dollars and no more; * * * ." Session Laws of 1935, page 784, Rem. Rev. Stat. Supp. Sec. 11211b.

It is contended that since the premium upon this life insurance was paid by the community, the surviving spouse had a vested interest in one-half of the proceeds of this policy, and because vested, it is not subject to an estate tax.

If this be true, for any constitutional reasons, we assume then that the above statutes of the State of Washington taxing all the insurance payable upon the life of the decedent by the community would be unconstitutional.

The interest of the State of Washington in this controversy is apparent.

Vested Community Interest Taxable

This court in the case of *Moffitt v. Kelly,* 218 U. S. 400, 54 L. Ed. 1086, 31 Sup. Ct. 79, has already held that community property that is already vested is taxable upon the death of one of the spouses because possession and enjoyment arise upon the death of the husband.

This court said in the *Moffitt* case:

"It is said, however, that the reasoning just stated, while it may be abstractly sound, is here inapplicable, because the thing complained of in this case is that the State of California has imposed an inheritance tax upon the share of the wife in the community and thereby taxed her as an heir of her husband, when if the laws existing at the time of the celebration of the marriage be properly construed and be held to be contractual she took her share of the property on her husband's death, not as an heir to property of which he was the owner, but by virtue of a right of ownership vested in her prior to the death of the husband, although the right to possess and enjoy such property wase deferred and arose only on his death. But for the purpose of enforcing the Constitution of the United States we are not concerned with the mere designation affixed to the tax which the court below upheld, or whether the thing or subject taxed may or may not have been mistakenly brought within the state taxing law. We say so because in determining whether the imposition of the tax complained of violated the Constitution of the United States, we are solely confined to considering whether the State had the lawful power, without violating the Constitution of the United States, to levy a tax upon the subject or thing taxed. This being true, as it clearly results from what we have said that the vesting of the wife's right of possession and enjoyment arising upon the death of her husband was subject to be taxed by the State, so far as the Constitution of the United States was concerned, it follows that whether the tax imposed was designated or levied as an inheritance tax or any other is a matter with which we have no concern."

Of this decision Justice Roberts says in his dissenting opinion in *Coolidge v. Long,* 282 U. S. 582; 75 L. Ed. 562, 51 Sup. Ct. 54:

"Whatever may be said of the nature of the wife's interest in community property, this decision assumes the wife's vested interest in her behalf thereof; and that its free and unencumbered enjoyment only was postponed to the husband's death."

This was also the holding in the case of *Newman*

v. Commissioner Internal Revenue, 76 Fed. (2d) 449, in which certiorari was denied 296 U. S. 200, 80 L. Ed. 425. The same ruling was upheld in the *Circuit Court of Appeals en banc in American National Trust and Savings Association, Executor of the last wil land testament of Merton J. Price, deceased, v. Commissioner of Internal Revenue,* 90 Fed. (2d) 981.

In Louisiana the court states as follows:

"It has been held that the usufruct that a surviving spouse enjoys upon the deceased spouse's half of the community is not subject to the state inheritance tax because it arises because of the marriage contract, and is not an inheritance. *See Succession of Marshal,* 118 La. 212, 42 So. 778."

"This usufruct, however, is taxable under the Federal estate tax." *Liebman v. Fontenot* (D. C.) 275 Fed. 688.

Dower and Curtesy Are Vested Interests

In Missouri the husband's interest in the wife's estate vests at the time of marriage, yet this is included as part of the gross estate for Federal estate purposes. *Kirkwood Estate,* Dec. 7081, 23 B. T. A. 955; *United States v. Waite,* 33 F. (2d) 567, certiorari denied, 50 Sup. Ct. 157.

In Nebraska the surviving spouse takes by operation of law, not by inheritance, and the state courts hold it not subject to inheritance tax, yet it is taxed for Federal estate purposes. *Allen v. Henggelas, Adm.* (C. C. A.) 32 Fed. (2d) 69, Cert. denied, 50 S. Ct. 40.

In the case of *Nyberg v. United States,* 66 Ct. Cls. 153, holds that dower and curtesy in a Nebraska case is taxable and this court refused to issue writ of certiorari, thereby affirming the *Nyberg* case, and in the case of *United States v. Waite,* 33 Fed. (2d) 567, this holding

was affirmed by certoriarial denial of this case in 50 S. Ct. 157.

The right of curtesy vests immediately upon the birth of lawful issue of the marriage and continues during the life of the husband and is a vested interest prior to her death. 17 C. J. 516. Most of the states tax dower and curtesy regardless of the fact that they are a vested interest prior to the death, on the theory that the possession or enjoyment of the property is finally consummated at death.

> "As to this second class, the statute specifically makes the liability for taxation depend, not upon the mere vesting in a technical sense of title to the gift, but upon the actual possesssion and enjoyment thereof." *Vanderbilt v. Eidman*, 196 U. S. 480, at 492, 49 L. Ed. 563, 25 Sup. Ct. 331.

In the case of *Tyler v. United States*, 281 U. S. 497, 74 L. Ed. 991, 50 Sup. Ct. 356, this court, in speaking of joint property, says (p. 503):

> "The question, here, then, is not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon the result to be measured, in whole or in part, by the value of such rights."

It is not the vesting of the title that is the occasion of the tax, but

> "The privileges enjoyed by the beneficiary of succeeding to the possession and the enjoyment of the property." *Saltonstall v. Saltonstall*, 276 U. S. 260, 72 L. Ed. 565, 48 Sup. Ct. 225.
>
> "Termination of the power of control at the time of death inures to the benefit of him who owns the property

subject to the power and thus brings about at death the the property which is the real subject of the tax. * * *." completion of the shifting of the economic benefits of the property which is the real subject of the tax. * * *". *Chandler v. Kelsey*, 205 U. S. 466, 51 L. Ed. 882, 27 Sup. Ct. 550.

> *Chase National Bank v. United States*, 278 U. S. 327, 73 L. Ed. 405, 49 Sup. Ct. 126.

Under these authorities the tax is valid and constitutional even though there is no succession. All that is necessary is that upon death there is a termination of power and control and the beneficiary receives the possession or enjoyment to a greater degree as a result of the death.

Entire Community Taxable in Washington

First. The husband has authority to sell, against the will and over the protest of his wife, any and all of the personal property by signing his own name, not as an agent, but as though he were the absolute owner. R. R. S., Sec. 6892; *Atwood v. McGrath*, 137 Wash. 400, 242 Pac. 648.

Second. The husband has the right to purchase any and all kinds of property against the will and over the protest of the wife. *Oregon Imp. Co. v. Sangmeister*, 4 Wash. 710, 30 Pac. 1058; *Bellingham Motors v. Lindberg*, 126 Wash. 684, 219 Pac. 19.

Third. The husband has the power by signing his own name alone to create a community indebtedness against the will and over the protest of his wife. *Bellingham Motors Corp. v. Lindberg, supra.*

Fourth. The creditor can obtain judgment against the husband in his own name and upon execution sell

both real and personal property of the community, regardless of the wishes of the wife. *Merritt v. Newkirk*, 155 Wash. 517, 285 Pac. 442; *Bellingham Motors Corp. v. Lindberg, supra.*

Fifth. The husband, without the wife and against her will and over her protest, has power to make an assignment to creditors which passes both the real and personal property of the community. *Thygeson v. Neufelder*, 9 Wash. 455, 37 Pac. 672.

Sixth. The husband has the power in his own name, against the will and over the protest of the wife, to bring suit for personal injuries to the wife and can settle the claim without the wife joining, contrary to her wishes, and release all claims arising from such injuries. *Schneider v. Biberger*, 76 Wash. 504, 136 Pac. 701; *Ostheller v. Spokane & Inland Empire R. Co.*, 107 Wash. 678, 182 Pac. 630.

Seventh. The husband, against the will and over the protest of the wife, may take out insurance either upon his life or the life of his wife. *Bellingham Motors Corp. v. Lindberg, supra; Seattle Association of Credit Men v. Bank of California*, 177 Wash. 130 at 138, 30 P. (2d) 972.

Eighth. The husband, against the will and over the protest of the wife, can sell this insurance or assign it as collateral to any debt he owes without the wife joining. *Seattle Association of Credit Men v. Bank of California, supra.*

Ninth. The husband has the power to collect all the income from all the real property, as well as the personal property, and invest it or pay it upon his debts regardless of the wishes of the wife. *Norman v. Levenhagen*, 142 Wash. 372, 253 Pac. 113.

But the husband cannot give away the community property. *Occidental Life Insurance Co. v. Powers,* 92 Wash. Dec. 425, 74 Pac. (2d) 27; *Marston v. Rue,* 92 Wash. 129, 159 Pac. 111.

The above statements have reference to community property alone and do not refer at all to the separate property of either spouse.

The above shows the possession, power of control, in the husband of the community property. The following indicates the wife's lack of control:

First. The wife cannot sell any part of the personal property. R. R. S. Sec. 6892; *Blum v. Smith,* 66 Wash. 192, 119 Pac. 183.

Second. The wife cannot go in debt and bind the community. *In re Finn's Estate,* 106 Wash. 137, 179 Pac. 103; *Jones-Rosquist-Killen Co. v. Nelson,* 98 Wash. 539, 167 Pac. 1130.

Third. The wife alone cannot sell her interest in the real property. R. R. S. Sec. 6893; *Olson v. Springer,* 60 Wash. 77, 110 Pac. 807.

Fourth. The wife cannot *take out life insurance* upon her own life or upon that of anyone else. *Blum v. Smith, supra; Jones-Rosquist-Killen Co. v. Nelson, supra.*

The above has relation to community transactions only.

Community Deceased

One of the first questions to arise under the community property law is whether or not upon the death of one of the spouses the joint community property should be administered upon, or upon the half of the community property belonging to the deceased spouse.

The following are the quotations taken from the leading opinion upon this question in the case of *Ryan v. Ferguson*, 3 Wash. 356, 28 Pac. 910:

"The interest of the surviving member in the community property may be likened to that of a lineal heir of the deceased." (Page 362.)

"Such interest should be treated the same as that of the heir or devisee." (Page 363.)

"It may be said that the community was deceased also—it ended with the death of the husband." (Page 366.)

Then the court defines the meaning of the words "estate of the deceased."

"The 'estate of the deceased,' so far as the payment of the debts against the community was involved, was the community estate." (Page 367.)

Possession, Control and Enjoyment Pass to Surviving Wife Upon Death of Husband

In fact, so far as the community property is concerned, the wife has no possession, no control, no management, no enjoyment, except what the husband confers upon her.

All the community property, both real and personal, can be sold for the debts incurred by the husband in the management of the community property without the wife being consulted, or over her protest and without her name even appearing in any of the proceedings, the same as though she did not exist.

The State of Washington is interested in this case first, for the reason that a decision may effect the taxability of community life insurance under the statutes of the State of Washington; second, for the reason that the State of Washington is entitled to 80% of the Federal estate tax under the 1926 Revenue Bill.

There are greater rights accruing to the wife in the community upon the death of the husband than there is accruing to the wife on the death of the husband in the joint tenancies, tenancies by entireties or dower, and if these confer such possession and enjoyment that makes them subject to estate taxes, then it cannot be claimed that the wife's community interest is not subject to estate taxes upon the death of her husband.

Upon the death of the husband there is something that passes in a community insurance policy that could not pass if it were not for his death, and this death is what generates the right to the property, the possession and enjoyment. This is the first time the wife secures this right and it is subject to tax. Upon the death of her husband the whole community life insurance is taxable.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 919.—October Term, 1937.

Richard E. Lang, Executor, and Grace E. Lang, Executrix, of the Estate of Julius C. Lang, Deceased, *vs.* Commissioner of Internal Revenue.	On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[May 16, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

The Circuit Court of Appeals has certified propositions of law concerning which instructions are desired for decision of a pending cause. U. S. C. A., Title 28, § 346.

In 1905 Julius C. Lang married in the State of Washington, where community property laws have long obtained, and both parties continued to be domiciled there until he died in 1929. At his death seventeen policies of insurance upon his life—totaling above \$200,000.00—were in force. Each policy required advanced payment of one premium. Fourteen specified the wife as sole beneficiary; children were the beneficiaries in three. Three of those payable to the wife were obtained by the assured prior to marriage and early premium payments upon them came from his separate property; later ones from community funds. Application for fourteen policies followed the marriage and all premiums thereon were paid from community funds.

The Commissioner of Internal Revenue ruled that under § 302(g), Revenue Act 1926, c. 27, 44 Stat. 9, the entire proceeds from all policies should be reckoned as part of the assured's gross estate subject to the permitted exemption of \$40,000. and made an assessment accordingly. The Board of Tax Appeals affirmed.

The exemption is not controverted and by admission each policy permitted the assured to change the beneficiary. The point for consideration is whether all or any portion of the proceeds of a policy, premiums on which were paid out of community funds, must be treated as part of the decedent's gross estate.

The court below concluded that the laws of Washington establish a community between spouses which is a separate entity, "just as a corporation or an association", and that life insurance pur-

chased with its funds is community property whose character the husband cannot defeat through change of beneficiary.

Accepting as correct, for present purposes, this construction of the local law, also treating the facts disclosed by the certificate as the essential ones, we come to consider the questions submitted for instructions which are restated in order more definitely to indicate our understanding of their significance.

The construction of the local law approved below is certainly a tenable one and finds support in *Graham* v. *Commissioner*, 95 F. (2d) 174, Ninth Circuit March 4, 1938; *Occidental Life Co.* v. *Powers,* Supreme Court of Washington, December 6, 1937; *Poe* v. *Seaborn,* 282 U. S. 101, 113.

Occasion for the certificate did not arise from doubts relating to the meaning of the community property laws of Washington, but from uncertainty concerning the application of the 1926 Revenue Act to an estate under administration in that State. The court was perplexed by *Bank of America* v. *Commissioner of Internal Revenue,* 90 F. (2d) 981, 983, which affirmed that the operation of that Act is not dependent upon local law and "therefore whatever the local law may be we believe it to be immaterial." This statement is not accurate and conflicts with what we have said. *Poe* v. *Seaborn,* 282 U. S. 101, 111, 112; *Blair* v. *Comr.,* 300 U. S. 5, 9, 10.

1. Must the total or only one-half of the proceeds collected under the insurance policies issued after marriage on the deceased husband's life be reckoned as part of his gross estate, the wife being sole beneficiary and all premiums having been paid from community funds? To this we answer, only one-half.

2. Must the total proceeds of the policy upon a decedent's life, taken out after marriage, children being the sole beneficiaries, and all premiums having been paid from community funds, be reckoned as part of his gross estate; or, in the circumstances, is only one-half to be included? To this we reply, only one-half should be included.

3. Must all proceeds of the policies issued before marriage upon the deceased husband's life be reckoned as part of his gross estate, the wife being sole beneficiary, the first premium having been paid from his separate funds, and all subsequent ones from community funds; or, in the circumstances, is the total received under the policy reduced by one-half of that proportion of such total which premiums satisfied with community funds bear to all premiums paid, the amount to be regarded as belonging to the gross estate? To

this we reply, only the total proceeds less one-half of the indicated proportion becomes part of the gross estate.

Section 301 Revenue Act 1926, *supra,* imposes a tax upon the transfer of the net estate of every decedent, etc. And § 302 provides—

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
[(a), (b), (c), (d), (e), (f).]

"(g) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

The Revenue Acts of 1918, 1921 and 1924 contain similar provisions relative to "policies taken out by the decedent upon his own life".

Treasury Regulations 37 promulgated under the Revenue Act of 1918 provide—

"Art. 32. . . . The term 'insurance' refers to life insurance of every description . . . Insurance is deemed to be taken out by the decedent in all cases where he pays the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance should not be included in the gross estate, even though the application is made by the decedent, where the premiums are actually paid by some other person or corporation, and not out of funds belonging to, or advanced by, the decedent. . . ."

And there are similar provisions in Treasury Regulations 63, Art. 27, promulgated under 1921 Revenue Act.

Treasury Regulations 68 promulgated under the Revenue Act 1924—

"Art. 25. . . .

"The term 'insurance' refers to life insurance of every description . . . . Insurance is deemed to be taken out by the decedent in all cases where he pays all the premiums, either directly or indirectly, whether or not he makes the application. On the other hand, the insurance is not deemed to be taken out by the decedent, even though the application is made by him, where all the premiums are actually paid by the beneficiary. Where a portion of the premiums were paid by the beneficiary and the remaining portion by the decedent the insurance will be deemed to have been taken out by the latter in the proportion that the premiums paid by him bear to the total of premiums paid."

"Art. 28. The amount to be returned where the policy is payable to or for the benefit of the estate is the amount receivable. Where the proceeds of a policy are payable to a beneficiary other than to or for the benefit of the estate, and all the premiums were paid by the decedent, the amount to be listed on Schedule C of the return is the full amount receivable, but where the proceeds are so payable and only a portion of the premiums were paid by the decedent, the amount to be listed on such schedule is that proportion of the insurance receivable which the premiums paid by the decedent bears to the total premiums paid. . . ."

Arts. 25 and 28, Treasury Regulations 70, promulgated under Revenue Act 1926, contain provisions identical with those just quoted.

Treasury Regulations 70 were in force when Lang died and are applicable to his estate. It is unnecessary for us to consider the meaning, validity or effect of the changes introduced by Regulations 80.

Articles 25 and 28 of Regulations 70 defines the words "policies taken out by the decedent upon his own life". Earlier regulations gave the same definition. Nothing else appearing, it must be treated as approved by Congress. *Helvering* v. *Bliss,* 293 U. S. 144, 151. Counsel for the Commissioner suggest that it is at variance with the statute, unreasonable and without effect; but we think this objection is clearly untenable.

Under the community property statutes of Washington, as interpreted below, one-half of the amounts of community funds applied to payment of premiums was property of the wife. To that extent she paid these premiums. Where she is the beneficiary, under the words of the Regulations she became entitled to the proceeds of the policy in proportion to the amount so paid.

Where children were named beneficiaries and premiums were paid from community funds the situation is not within the precise words of the Regulations; but the rather obvious reason underlying the definition of what constitutes a policy "taken out by the assured" should be respected. In the absence of a clear declaration it cannot be assumed that Congress intended insurance bought and paid for with the funds of another than the insured and not payable to the latter's estate, should be reckoned as part of such estate for purposes of taxation. See *Iglehart* v. *Comr.,* 77 F. (2d) 704, 711.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.